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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 688

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY MCCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. MCCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma, *Appellants*,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	PAGE
a. Opinion of the Court Below	1
b. Grounds of Jurisdiction	2
(i) Nature of the Proceeding	2
(ii) Dates of Judgment and Appeal	9
(iii) Statutory Jurisdiction of This Court	10
(iv) Cases Sustaining Jurisdiction on Appeal	10
(v) State Legislation Involved	11
c. Questions Presented by the Appeal	11
d. Statement of the Facts	14
e. Substantiality of Questions Presented	21
Conclusion	23

INDEX TO AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution, Art. IV, Sec. 4	12
United States Constitution, Amendment XIV	11, 12, 19
Oklahoma Constitution, Art. V, Secs. 1-4	16
Oklahoma Constitution, Art. V, Sec. 9(a)	19
Oklahoma Constitution, Art. V, Secs. 9, 10	14, 18
Oklahoma Constitution, Art. V, Sec. 10(d)	3, 20
Oklahoma Constitution, Art. V, Sec. 11	14
Oklahoma Constitution, Art. XXIV, Secs. 1, 3	16

INDEX CONTINUED

PAGE

FEDERAL STATUTES:

62 Stat. 928 10
62 Stat. 968 10
28 U.S.C., Sec. 1253 10
28 U.S.C., Sec. 2281 10

STATE STATUTES:

Okla. Stat. 1961, Vol. 1, pp. 64-65 11
Okla. Stat. 1961, Vol. 1, pp. 65-66 11
Okla. Stat. 1961, Vol. 1, pp. 1042-1046 11
Okla. Stat. 1961, Vol. 1, pp. 1047-1051 11

14 Okla. Stat. 1961, Secs. 9-72 ..... 3, 15
14 Okla. Stat. 1961, Secs. 97-100 15
14 Okla. Stat. 1961, Secs. 99, 100 3

TEXTS:

McCloskey, "Foreword: The Reapportionment Case," Harvard L. Rev., Nov. 1962, Vol. 76, p. 54 21

COURT DECISIONS:

Baker v. Carr, 369 U.S. 186 ..... 2, 5, 21
Brown v. State Election Board (Okla.), 369 P.2d 140 ..... 15, 18

Fay, In re, 291 N.Y. 198, 52 N.E.2d 97 20
Federal Housing Administration v. The Darlington, Inc., 352 U.S. 977, 358 U.S. 84 10
Florida Lime and Avocado Growers, Inc. v. Jacobson, 362 U.S. 73 10

Jones v. Cordell, 197 Okla. 61, 168 P.2d 130 15
Jones v. Freeman, 193 Okla. 554, 146 P.2d 564, app. dis. 322 U.S. 717 15
Jones v. Winters (Okla.), 369 P.2d 135 15
Jones v. Winters (Okla.), 365 P.2d 357 ..... 15, 18

Latting v. Cordell, 197 Okla. 368, 171 P.2d 266 20

INDEX CONTINUED

PAGE

Miguel v. McCarl, 291 U.S. 442 10

Ohaver v. French, 206 Cal. 118, 273 Pac. 555 10

Reed v. State Election Board (Okla.), 369 P.2d 150 ..... 15, 18

Romang v. Cordell, 206 Okla. 369, 243 P.2d 677 15

Sanders v. Gray, 370 U.S. 921 10

INDEX TO APPENDIX

Appendix I:

Memorandum of Facts and Conclusion of Law on Motion for Interlocutory Relief ..... i-xiv

Appendix II:

Dissenting Opinion of Judge Ross Rizley ..... xiv-xxvi

Appendix III:

Interlocutory Decree ..... xxvii-xxviii

Appendix IV:

Further Statement of Facts and Law on the Merits ..... xxix-xl

Appendix V:

Decree ..... xli-xliv

Appendix VI:

Dissenting Opinion of Judge Rizley ..... xlv-lv

Appendix VII:

Article V, Sections 9, 9a, 9b and 10, Constitution of Oklahoma (Volume 1, pp. 64-65, Oklahoma Statutes 1961) ..... lvi-lix

INDEX CONTINUED PAGE

Appendix VIII:

(a) Article V, Section 11, Constitution of Oklahoma. (Volume I, pp. 65-66, Oklahoma Statutes 1961 ..... lx-lxi

(b) Title 14, Sections 9-72, incl., Oklahoma Statutes 1961. (Volume I, pp. 1042-1046, incl., Oklahoma Statutes 1961) ..... lxi-lxix

Appendix IX:

Title 14, Sections 97-100, incl., Oklahoma Statutes 1961. (Volume I, pp. 1047-1051, incl., Oklahoma Statutes 1961 ..... lxix-lxxix

Appendix X:

(a) Article V, Sections 1-4, incl., Constitution of Oklahoma (Volume I, pp. 62-63, Oklahoma Statutes 1961) ..... lxxx-lxxxi

(b) Article XXIV, Sections 1 and 3, Constitution of Oklahoma (Volume I, p. 137, Oklahoma Statutes 1961) lxxxii

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

a. OPINION OF THE COURT BELOW

The final interlocutory Decree and opinion of the United States District Court for the Western District of

Oklahoma, in this cause, is reported in 207 Federal Supplement 885, *et seq.* Appended hereto: As Appendix I, is "Memorandum of Facts and Conclusion of Law on Motion for Interlocutory Relief"; as Appendix II, is "Dissenting Opinion of Judge Ross Rizley"; as Appendix III, is an "Interlocutory Decree" of the Court; as Appendix IV, is the aforementioned "Decree"; as Appendix V, is a "Further Statement of Facts and Law on the Merits," filed with the Decree; and as Appendix VI, is the "Dissenting Opinion of Judge Rizley."

b. GROUNDS OF JURISDICTION

(i) Nature of the Proceeding

(a) This is an appeal from the interlocutory Decrees of a 3-Judge Federal Court in a proceeding relating to the validity of the Oklahoma Legislature as affected by the provisions of the Constitution of the United States, as a sequel to the decision in *Baker* v. *Carr*, 369 U.S. 186.

(b) The precise nature of the proceeding is impossible to describe in legal terminology, or as concisely as customarily may be done, due to the virtually unprecedented informality which chacterized the progress and conduct of the proceeding, the degree of which was likened, even by a sympathetic press, to a "garden party." Appellants, therefore, are reduced to the regrettable alternative of describ-

ing the steps taken in the proceeding to enable the Court, itself, to classify its fundamental nature.[1]

The appeal to this Court is taken upon the premises that the Decrees by intent, practical operation and legal effect—

(1) By declaring, in the "Interlocutory Decree" of June 19, 1962, as modified by the "Decree," that Title 14, Sections 9-72, inclusive, 99 and 100, Oklahoma Statutes 1961, and Article V, Section 10(d), Oklahoma Constitution, to be "prospectively null and void and inoperative for all future elections" and Article V, Section 10(d), Oklahoma Constitution, to result in invidious discrimination * * * (and) therefore violates the Fourteenth Amendment of the United States Constitution, and must be disregarded," the said Decrees restrain all of the defendants from acting under said State laws;

(2) By prescribing "the positive guidelines or standards" for legislative reapportionment action to be taken at the 1963 Legislative session, and positively ordering such action to be taken, applicable to the majority of the members of the Oklahoma State Senate, who were parties defendant, the Decrees constituted a mandatory injunction; and

[1] Because of the inherent impossibility of a prior definite forensic classification, Appellants concurrently are prosecuting an appeal to the Court of Appeals for the Tenth Circuit for a review of the decrees in the event that they be not considered injunctive but rather are to be classified comprehensively as a declaratory judgment and the reserved jurisdiction for its enforcement only. In order that the Oklahoma legislative reapportionment controversy may be considered by this Court in conjunction with related controversies existing in other States, presently on appeal or in course of appeal to it, in the event that the Court shall determine this appeal unauthorized by the above statute it is the purpose of Appellants to seek certification by the Court of Appeals of the questions presented for review.

(3) By retention of jurisdiction for final adjudication, the Decrees were merely interlocutory rather than permanent in nature—

all of which, collectively, rendered them directly appealable to this Court.

The intended prohibitory intent of the Decrees is established by the refusal of the Court to stay and permit supersedeas of the Decrees, requested by appellants in order to permit the holding of a legal special election for a successor to Senator Charles M. Wilson, one of the intervening defendants who had resigned his Senate office to fill a Judgeship to which he had been elected at the November election.

The instant proceeding was instituted by Appellee Moss as plaintiff, in 1961 prior to the decision in *Baker* v. *Carr*, *supra*, naming as defendants certain of the appellees. Nothing pertinent occurred until after rendition of that decision, when a 3-Judge Court was constituted and the plaintiff was allowed to amend and supplement his complaint, joining as defendants the members of the State Election Board.

The complaint alleged the Oklahoma legislative apportionment of the House of Representatives and the Senate to be invidiously discriminatory against the plaintiff and all similarly situated, depriving them of equal protection of the law in the matter of suffrage and a right to substantially equal vote for legislative representatives in violation of the Constitution of the United States, Amendment XIV. The original complaint (and an amendment thereto) then had

prayed that the existing Oklahoma legislative and senatorial districts be declared void and that the State Treasurer, State Auditor and the Oklahoma Tax Commission be enjoined from taking any official action on any legislation passed by former allegedly malapportioned Legislatures. The amended and supplemented complaint sought an injunction to prevent the holding of the then-pending Primary Election for legislative offices and for an order to compel such officers to be nominated and elected in the State at large.

At a hearing held before the 3-Judge tribunal on April 17, 1962, all of the defendants appeared by counsel; and the appellee J. Howard Edmondson, Governor of the State of Oklahoma, was permitted to intervene as an additional party defendant. This hearing was highly informal and the record is not entirely clear as to its exact purpose at the time it was held. The defendants had not answered the complaint, no evidence was introduced and all of the then defendants orally joined the plaintiff in requesting that the Court order relief of some sort. The cause was ordered "submitted," but no other action was taken.

On April 20, 1962, appellants Price, Rasberry and Hutchens filed an application to intervene as parties defendant and tendered an Answer controverting the amended and supplemented complaint, the first pleading in the action so doing. At a short hearing on April 23, 1962, they were granted permission to intervene and file their Answer. A request of the intervening defendants for time to present evidence of rationality of the existing apportionment of the

Oklahoma Legislature was refused; and there was stipulated only the figures shown by the 1960 Federal Census as to population of the State and by counties, the distribution of representation in the Legislature under existing laws and that candidacies for nomination to the legislative offices already had been certified to the County Election Boards by the State Election Board.

Without further ado, the Court announced the "denial of interlocutory relief" to the plaintiff and, on April 30, 1962, there was filed a "Memorandum of Facts and Conclusion of Law for Interlocutory Relief," and a "Dissenting Opinion of Judge Ross Rizley" (Appendices I and II). Interlocutory relief being denied, the intervening defendants were without grounds for appeal at that time, despite the findings of fact and conclusions of law made the basis for the later Decrees. Plaintiff did not appeal.

Without any other of the defendants answering, a pretrial was set for May 29, 1962, and trial on the merits was set for June 12, 1962. Intervening defendants' (appellees Price, *et al.*) motion to postpone a pretrial was overruled and a hearing termed a "pretrial" was held, although answers of the other defendants were not filed until May 31, 1962, June 6, 1962, June 8, 1962, and June 11, 1962, respectively, after the "pretrial."

A "hearing on the merits" then was held on June 12, 1962, after overruling intervening defendants' request for a continuance. Following that hearing, an "Interlocutory Decree" (Appendix III) was entered on July 19, 1962; and the cause set for further hearing for "effectuation of ap-

propriate relief and final judgment." A Motion to Alter or Amend, filed by the intervening defendants, formally was ordered taken under advisement until that hearing, set for July 31, 1962.

This "Alternative Decree," now directed to the State Election Board who had been made defendants, decreed that certain of the statutes of the State and certain of its constitutional provisions, relating to legislative apportionment and integrally involving duties of the Election Board in conducting elections for legislative offices, "where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections."

It was this latter portion of the decree that prompted the motion to stay and supersede later filed by appellants.

The Decree also stated that the cause was continued until July 31, 1962 (after the Primary Elections), "for the effectuation of appropriate relief and *final judgment*." (Emphasis ours.)

Prior to the hearing which resulted in that "Interlocutory Decree," the remainder of the present appellants, 27 of the incumbent members of and nominees to the 44-member State Senate,[2] requested permission to intervene and tendered their answer to the amended and supplemental complaint. The Oklahoma Farm Bureau and Lewis H. Munn did likewise, but are not named as appellees in this appeal since they, too, are prosecuting an appeal.

[2] Three of these now being omitted as appellants since one resigned as aforesaid and two failed of election.

At the commencement of the next hearing, on July 31, 1962, those so applying were permitted to intervene as defendants and to file their tendered answers. Also permitted to intervene during the course of the hearing was the last-named appellee, the Court declaring that an *amicus curiae* pleading previously filed by it, largely supporting plaintiff's action, be considered as a petition in intervention.

This latter hearing actually assumed more of the character of a hearing on the merits than the former hearings; but after its conclusion, the Court rendered its last Decree (Appendix IV). Therein, it "overruled" the Motion to Alter or Amend the "Interlocutory Decree" of July 19, 1962 (Appendix III "Except, etc."; and therein stated that the Court had decided to "defer action to the general session of the Oklahoma Legislature to be held in 1963, with a date to be fixed for final action in the matter by the Legislature *and with positive guidelines or standards now being furnished said Legislature in the matter of discharging its responsibility to reapportion both houses of said Legislature.*" (Emphasis ours.)

And the Decree proceeded to establish specified "guidelines or standards" upon which, the Decree provided, "The Oklahoma Legislature *will be* reapportioned" (emphasis ours); and concluded:

> "Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and the case dismissed. Failing

this accomplishment, this Court will then order and decree reapportionment by judicial order, in conformity with the guidance herein furnished."

Notwithstanding the refusal by the lower court to make all members of the Oklahoma Legislature parties to the action, as was suggested by appellants, that body being the only agency of the State upon which the power of reapportionment of the Legislature had been conferred by the State Constitution, nevertheless among the appellants are a majority of the State Senate, a number sufficient to initiate reapportionment action in the Legislature.

Therefore, the second premise of this appeal is that those particular appellants are being commanded to perform their governmental duty in a certain specified manner which they deem legally erroneous as shown by the questions hereinafter enumerated.

(ii) Dates of Judgment and Appeal

The Decrees sought to be reviewed are (a) the "Interlocutory Decree" (Appendix II) entered on July 19, 1962, effectiveness of which was stayed by the filing of a Motion to Alter or Amend on July 29, 1962, ordered by the trial court, on July 2, 1962, to be taken under advisement and thereafter "overruled" on August 3, 1962, and (b) the "Decree" entered on August 3, 1962.

The Notice of Appeal by these appellants was filed in the trial court on August 31, 1962.

Enlargements of time to file record and docket the appeal were ordered by a Judge of the trial court as fol-

lows: (a) on October 22, 1962, enlarging time to November 15, 1962; (b) on November 7, 1962, enlarging time to December 1, 1962; (c) on November 21, 1962, enlarging time to December 15, 1962; and (d) on December 10, 1962, enlarging time to December 21, 1962.

(iii) Statutory Jurisdiction of This Court

This appeal is taken pursuant to the provisions of the Act of June 25, 1948, c. 646,[3] the 3-Judge court having been constituted under the same Act,[4] to hear the claim of the plaintiff Moss to restrain the enforcement and execution of the statutes of the State of Oklahoma, enacted by the Oklahoma Legislature as constituted, and to restrain the actions of State officials upon the ground that the Constitution and statutes of the State of Oklahoma in relation to legislative apportionment are unconstitutional as in contravention of the Constitution of the United States.

(iv) Cases Sustaining Jurisdiction on Appeal

Appellant submits the following cases which are believed to sustain the jurisdiction of this Court on this appeal: *Baker* v. *Carr, supra*[5]; *Sanders* v. *Gray*, 370 U.S. 921; *Florida Lime and Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. 73, 84-85; *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977, 358 U.S. 84; *Miguel* v. *McCarl*, 291 U.S. 442; *Ohaver* v. *French*, 206 Cal. 118, 273 Pac. 555.

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[3] 62 Stat. 928; 28 U.S.C., Sec. 1253.

[4] 62 Stat. 968; 28 U.S.C., Sec. 2281.

[5] 369 U.S. 186.

(v) State Legislation Involved

The following constitutional and statutory provisions are involved in the operation of the Decrees, it being necessary to set forth their text in appendices due to their length:

Appendix VII —Article V, Sections 9, 9a, 9b and 10, Constitution of Oklahoma.[6]

Appendix VIII—(a) Article V, Section 11, Constitution of Oklahoma.[7]

(b) Title 14, Sections 8-72, incl., Oklahoma Statutes, 1961.[8]

Appendix IX —Title 14, Sections 97-100, incl. Oklahoma Statutes, 1961.[9]

Although all of the above constitutional provisions were not expressly declared void and inoperative, their validity is directly involved in the operation of the Decrees.

c. QUESTIONS PRESENTED BY THE APPEAL

First. Whether, in order to comply with the requirements of Amendment XIV to the Federal Constitution in relation to equality of suffrage in selection of State legislative representation, it is necessary that the election of the representatives to BOTH branches of a State bi-cameral Legislature must be controlled by the same measure of constituency?

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[6] Volume 1, pp. 64-65, Oklahoma Statutes 1961.
[7] Volume 1, pp. 65-66, Oklahoma Statutes 1961.
[8] Volume 1, pp. 1042-1046, incl., Oklahoma Statutes 1961.
[9] Volume 1, pp. 1047-1051, incl., Oklahoma Statutes 1961.

Second. Whether the provisions of Amendment XIV to the Federal Constitution result in revising the requirements of Article IV, Section 4, of said Constitution, for maintenance of a republican form of government, thereby requiring numerical equality of constituency for election of representatives to BOTH branches of a State bi-cameral Legislature?

Third. Whether, when a State Constitution provides adequate machinery, by initiative or referendum action, for the electors of a State to adopt and revise their governmental processes for the selection of representatives to the State Legislature and the allocation of the constituency of the several representatives therein, any elector of the State is deprived of any right or privilege secured under Amendment XIV to the Federal Constitution by reason of any revision or nonrevision of any existing allocation of constituency effected by constitutional processes?

Fourth. Whether the geographic allocation of population by a Federal Census, as made or permitted by law to be made, constitutes a reasonable or rational measure of equality of any right or privilege of the respective constituencies, or any component thereof, for election of representatives to EITHER branch of a State Legislature, under Amnedment XIV to the Federal Constitution, when it is established legally that such geographic allocation need not, and factually that it does not approximate the exposition of the electoral attributes of the existing or proposed respective constituencies of Representatives to the State Legislature?

Fifth. Whether, after fully acknowledging the equitable justiciability of an action founded upon invidious discrimination of State legislation relating to the apportionment of representation in the State Legislature, or to the allocation of constituency to other governmental officers, congressional, judicial or executive, the constitutional *judicial power* exists to fashion a remedy inherently involving political discretion and personal preference incapable of definitive standardization, such as the ordering of State officers to effectuate without constitutional or other warrant, or the direct establishment by decree of a specific governmental structural pattern for selection of such officers?

Sixth. The only showings made to the Court were (a) that the State Legislature had failed to enact the decennial legislation, by the STATE Constitution directed to be enacted, to establish a revised pattern of allocation of constituency for election of State Senators in accordance with the formula prescribed by the State Constitution, (b) that the legislation enacted by the 1961 Legislature, reapportioning the House of Representatives, did not conform to the formula prescribed by the STATE Constitution, and (c) that the existing pattern of apportionment was grossly unequal if measured by Federal Census geographic allocation of population to the several Senatorial and Representative districts. No direct evidence of invidious culpableness was even offered. Based upon that state of the record, this question is WHETHER, where compliance with the STATE constitutional formulae unquestionably would result in similar inequality, and where adequate machinery

exists, under the Oklahoma Constitution, for the electors to propose and adopt reapportionment legislation, to reject legislative action and to revise the defective State constitutional formulae, a Court properly, within the scope of equitable and constitutional principles, should grant equitable relief to one complaining of the existing situation?

d. STATEMENT OF THE FACTS

Upon the admission of Oklahoma into the Union in 1907, its Constitution provided for a bi-cameral Legislature to be composed of a Senate and a House of Representatives. The Constitution initially created 33 Senatorial Districts for the election of 44 Senators,[10] and provided initially for a House of Representatives of 109 members.[11]

The Constitution also provided that the Legislature should reapportion following the Federal Census of 1910 and decennially thereafter, prescribing formulae for so doing. Although certain of the constitutional provisions are somewhat ambiguous, the standard for reapportionment was the number of inhabitants of each constituency, determined by the last preceding Federal Census, "or in such manner as the Legislature may direct."[12]

As to the Senate, no general reapportionment ever was enacted by the Legislature. The Senatorial Districts were revised by separate enactments, without increasing num-

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[10] Oklahoma Constitution, Art. V, Sec. 11; Appendix VIII.

[11] Oklahoma Constitution, Art. V, Sec. 10; Appendix VII.

[12] Oklahoma Constitution, Art. V, Secs. 9 and 10; Appendix VII.

ber of Senators.[13] At the 1961 Session an effort was made to enact a general reapportionment of the Senate, but the Supreme Court of Oklahoma held that it had failed of passage over the Governor's veto.[14]

The House of Representatives was reapportioned several times, but never in strict conformity to the constitutional formula.[15] The 1961 Legislature passed a reapportionment act for the House of Representatives,[16] but it did not conform to the constitutional formula, either.[17]

At a Special Election held on a Legislative Referendum proposing to amend the Constitution in respect to reapportionment of the Legislature, revising in some particulars the constitutional formulae and transferring the power of reapportionment from the Legislature to an administrative board, with the State Supreme Court being expressly authorized to compel periodic reapportionment, the electors rejected the measure by a majority of nearly 4 to 1.[18]

In this connection, it should be mentioned that the Oklahoma Constitution contains effective machinery for

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[13] Title 14, Secs. 9-72, incl., Okla. Stat. 1961; Appendix VII.

[14] *Jones* v. *Winters* (Okla.), 365 P.2d 357.

[15] *Jones* v. *Freeman*, 193 Okla. 554, 146 P.2d 564, *app. dis.* 322 U.S. 717; *Jones* v. *Cordell*, 197 Okla. 61, 168 P.2d 130; *Romang* v. *Cordell*, 206 Okla. 369, 243 P.2d 677; *Jones* v. *Winters* (Okla.), 369 P.2d 135; *Brown* v. *State Election Board* (Okla.), 369 P.2d 140; *Reed* v. *State Election Board* (Okla.), 369 P.2d 156.

[16] Title 14, Secs. 97-100, incl., Okla. Stat. 1961; Appendix IX.

[17] *Jones* v. *Winters*, *supra*, N. 17; *Brown* v. *State Election Board*, *ibid.*; *Reed* v. *State Election Board*, *ibid.*

[18] Session Laws 1961, H.J.R. No. 523; Title 34, Appendix, Okla. Stat. 1961.

both amendment of the Constitution and the enactment of legislation by the people.[19]

Other than the failure of the Legislature to conform to the constitutional formulae, and the admitted fact that the present apportionment of neither the Senate nor the House of Representatives provides substantial equality of population as reported by the Federal Census, the complainant presented no evidence to sustain his prayer for judicial relief.

The appellants sought, and were refused the right, if permitted reasonable time so to do, to assume the burden of showing that the present apportionment was made by the Legislature upon a basis of consideration of reasonable factors applicable to a republican form of government, if not in conformity to the constitutional formulae.

They did establish, by unimpeachable documentary evidence, that the methods used by the United States Census Bureau in geographically allocating population were such as to render that allocation useless as a measure of electorial power of any particular constituency. It was shown that (1) college students were enumerated at the site of the college despite their actual residence elsewhere (an indispensable requisite to exercise of suffrage); (2) persons in the Armed Forces (which maintain several important bases in Oklahoma with large personnel) were enumerated at the location of their base instead of their place of legal residence; (3) persons in penal institutions were included in the population of the counties where the institu-

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[19] Oklahoma Constitution, Art. V, Secs. 1-4, incl.; *id.* Art. XXIV, Secs. 1, 3; attached hereto as Appendix X.

tions are located, even though such inmates are deprived of suffrage; and (4) that the proportionate enrollment of students in primary and secondary schools, such students presumably being almost entirely below voting age, varied widely in the various counties of the State.

Specific statistics were introduced by the appellants on all of these factors; and the effect of their impact upon the distribution of electorial responsibility and power in a State of relatively small population was self-evident. This further was emphasized by the introduction of official statistics on elector registration (a prerequisite to the exercise of suffrage in Oklahoma, although without any unrelated obstacles, such as a poll tax, to restrict eligibility), showing an entire lack of relation of census population to the political power and responsibility of any constituency.

From their pleadings and conduct at the hearings held by the court, all of the appellees, even though nominally defendants, joined with the plaintiff in seeking action by the court. Had the appellants failed to enter their appearances, the proceeding would have been in fact *ex parte*. Not a single defendant had even answered the plaintiff's complaint until after the answer of the appellants had been filed on their intervention and then not until after appellants had been forced to participate in a "pretrial" before those other answers had been filed.

The 3-Judge Court refused to enjoin the holding of the Primary Election in May, although requested so to do by the appellees. It further held that its declaration of invalidity of the Oklahoma legislative apportionment legis-

lation was to be prospective only, refusing to enjoin the holding of the General Election in November upon the premise that that Election had been commenced by the filing for the several offices prior to the Primary Election and that the entire process of filing, nomination and election was an integral holding of an election which had commenced prior to the Court's ruling.

But, it refused to stay the Decree to enable a Special Election to be held to fill the vacancy in the Senate created by the resignation of Senator Charles M. Wilson. This, notwithstanding the fact that the Decree could be effectuated only after January 1, 1963, when the next session of the Oklahoma Legislature convenes.

The Decrees of the Court are directed to the members of the Oklahoma Legislature. The only members of that body who are parties to the litigation are the 24 State Senators among the appellants. Yet the Court refused to consider the pleading of the appellants suggesting that a defect of parties existed unless *all* members of the Legislature be made parties.

Under the Oklahoma Constitution, the only agency of government with the constitutional power to reapportion the Legislature is the Legislature itself.[20] None of the defendants are given that governmental authority. Even the Supreme Court of the State cannot perform that governmentally creative act.[21]

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[20] Art. V, Secs. 9 and 10, Oklahoma Constitution, *ibid.*

[21] *Jones* v. *Winters, supra,* n. 14; *Brown* v. *State Election Board, supra,* n. 15; *Reed* v. *State Election Board, id.*

The invidiousness of the discrimination against the plaintiff, assigned by the Court in justification of its jurisdiction, is found solely upon the failure of the Legislature to follow the *Oklahoma Constitution* and the bare fact that there is a disporportion of population of constituencies under the *Federal Census*. Appellants concede both of those facts but deny that they establish culpable invidiousness to bring into application Amendment XIV to the Federal Constitution or equitable jurisdiction of a Court.

The last Decree of the Court, however, contains three salient elements which raise questions of transcendental judicial and governmental importance.

First. The Decree adopts; and directs the Legislature to enact into law a pattern of apportionment advanced by a witness at the hearings and advocated by appellees, a pattern which the witness admitted required the exercise of preference and discretion in the allocation of geographical areas to constituencies, other patterns of allocation producing substantially equal results. The so-called "guide lines and standards" are specific detailed instructions rather than true "standards" within the scope of which the Legislature may select alternatives. The Decree, therefore, is political, rather than judicial in nature.

Second. The Decree directs the enactment by the Legislature of a law which contravenes the provisions of the Oklahoma Constitution in at least two particulars,[22]

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22 (a) Article V, Section 9(a), Okla. Const. (Appendix VII) provides that "in the event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county *in addition to the forty-four*

requiring that body to exceed the limits of the authority conferred upon it by the instrument creating it. By so doing, the Decree has the practical fundamental effect of judicially *amending a State Constitution*, not only prescribing the definitive structure of a State government but also empowering the authority to effect that action.

Third. The Decree states that if the Legislature does not follow the directions given, the Court will, for all practical effect, *constitute itself* the authorized agency of the State of Oklahoma to prescribe the composition of the Legislative Department of government of the State without consulting the people of the State, *i.e.*, to rewrite the Constitution of the State. This latter declaration, of course, would be appealable if attempted to be effected, but in the context of the issues here, the scope of the judicial power in controversies which contain political as well as judicial components, the consideration of that declaration is not inappropriate.

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22 (Continued)
senators." The Decree limits the membership of the Senate to a total of 44 Senators although it directs that 8 Senators be given to Oklahoma County, 7 be given to Tulsa County and 2 be given Comanche County. The latter, of course, in conflict with the 3-senator provision of the Constitution. This provision of the Oklahoma Constitution was adopted from the New York Constitution of 1894 which the New York courts have construed to require the increasing of the total number of Senators if additional Senators be given any county. *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97; *Latting* v. *Cordell*, 197 Okla. 368. 171 P.2d 266.

(b) Article V, Section 10(d), Okla. Const. (Appendix VII), limits membership from any county, in the House of Representatives, to 7 members. The Decree directs that Oklahoma and Tulsa Counties be given 19 and 15, respectively, declaring that the Oklahoma Constitutional Convention of 1907—56 years ago—"invidiously discriminated" against the plaintiff.

e. SUBSTANTIALITY OF QUESTIONS PRESENTED

In view of the sweeping repercussions[23] to the decision of this Court in *Baker* v. *Carr, supra,*[24] of which the Court cannot be unaware, it should be unnecessary to enlarge upon the substantiality of the questions presented for plenary consideration by this Court, with briefs on the merits and oral argument, and for their resolution.

Some of the facets of the questions presented are common to those involved in other litigation either presently docketed in this Court or in process of being appealed. Others are novel to the extent of not having previously been advanced, so far as counsel are aware.

Together with most of the other States engaged in one form or another of attempted correction of their legislative misapportionment, Oklahoma is awaiting further advice from this Court as to many unexplained implications of the *Baker* v. *Carr* decision. The Decrees in this controversy order action by the Oklahoma Legislature by March 8, 1963, action which would require the Legislature to ignore the State Constitution.

If obliged so to do, despite the calumnies of chronic detractors of basic governmental legislative institutions to the contrary, the Oklahoma Senate will perform its duty, as it did in the correction of the racial segregation problem in the educational field after this Court had spoken on the subject.

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[23] McCloskey, "Foreword: The Reapportionment Case," Harvard L. Rev., Nov. 1962, Vol. 76, p. 54.

[24] *Ibid.*, n. 5.

But the Senate cannot, without protest, comply with a judicial decree which enjoins upon it not only a violation of the State Constitution but the establishment of an apportionment which is wholly unscientifically constructed for providing reasonable equality of legislative representation. Neither can it, as an integral component of the government of a sovereign State, supinely accede to the unprecedented assumption of governmental power, by an inferior Federal judicial tribunal, destroying as it does all of the traditional concepts of the respective scopes of State and Federal spheres of action.

To maintain orderly governmental processes within those concepts, it will require the submission to the people of Oklahoma of a revised *Constitutional* formula for legislative representation. But even this cannot be done with any assurance of authoritative finality until this Court has expanded the explanation of the rationale of the *Baker* v. *Carr* decision by answering the questions here presented and those presented in other appeals involving the apportionment problem.

As this Court cannot be unaware, its decision has created a state of nationwide governmental confusion which can be resolved only by further exposition. Surely, it cannot contemplate a solution other than by rules which shall have national rather than specific application.

These appellants are as avid for an expeditious solution to the unrest occasioned by the apportionment controversy as are the Courts and at least some of those decrying the present allocations. This litigation, together with the others contemporaneously being presented to this Court,

can afford the means for such a determination and the avoidance of further protracted litigation with the unrest which will be entailed thereby.

Therefore, in order that Oklahoma may know what action it should take to cope with its apportionment problem, adjusted to its own needs within true standards prescribed by the highest court in the land, it is respectfully urged that the Court retain this appeal for plenary consideration, along with the other apportionment appeals which will come to the Court at this term, as one vehicle for establishment of the powers and limitations of the States in relation to distribution of political initiative and responsibility among their representative constituencies.

Respectfully submitted,

WALT ALLEN,
Chickasha, Oklahoma,

JIM A. RINEHART,
El Reno, Oklahoma,

LEON S. HIRSH,
JAMES C. HARKIN,
Oklahoma City, Oklahoma,

Attorneys for Appellants.

Of Counsel:
PAUL JOHANNING

APPENDIX

APPENDIX

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. MOSS,
Plaintiff,
vs.
WILLIAM A. BURKHART, State Treasurer; ANDY ANDERSON, State Auditor; and J. D. DUNN, LAWTON LEININGER and MIKE CONNERS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWETT, Vice-Chairman, and LOUIE E. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma,
Defendants,
and
M. A. PRICE, JOHN M. RASBERRY, J. R. HUTCHENS and ROY GRIMES, Directors of Oklahomans For Local Government, an unincorporated association,
Intervenors.

No. 9130

Sid White for the Plaintiff, Harry R. Moss.

Delmer Stagner for the Defendant, William A. Burkhart, State Treasurer.

Fred Hanson, First Assistant Attorney General, for the Defendants, Andy Anderson, State Auditor; and J. D. Dunn,

[APPENDIX]

Lawton Leininger and Mike Conners, composing the Oklahoma Tax Commission of the State of Oklahoma.

John Wagner and Robert Blackstock for the Defendants, Clee Fitzgerald, Chairman, Herbert F. Hewett, Vice-Chairman, and Louie R. Geiser, Secretary, Members of the State Election Board of the State of Oklahoma.

Norman Reynolds for the Defendant, J. Howard Edmondson, Governor of the State of Oklahoma.

Leon S. Hirsh for the Intervenors, M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes, Directors of Oklahomans For Local Government, an unincorporated association.

Jim A. Rinehart for the Intervenor, M. A. Price.

Before MURRAH, Circuit Judge, and RIZLEY and DAUGHERTY, District Judges.

MURRAH, Circuit Judge.

MEMORANDUM OF FACTS AND CONCLUSION OF LAW ON MOTION FOR INTERLOCUTORY RELIEF

Endorsed: Filed Apr. 30, 1962
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

The Pleadings

This class action is a sequel to *Radford* v. *Gary*, 145 F. Supp. 541, in which another named plaintiff assailed the Oklahoma Apportionment Statutes for the election of the members to the Oklahoma Legislature, as a deprivation of the equal protection of the laws, vouchsafed to him by the Fourteenth Amendment to the United States Constitution. Like the named plaintiff in the *Radford* case, the plaintiff here is a citizen and resident of Oklahoma, and a qualified voter of the most populous County in the State. As such representative citizen and voter, he alleges that because of the shifting population of the state of Oklahoma from the rural sections to the cities and urban areas and because of the failure and refusal of the Legislature to reapportion its members as required by Article 5, Section 10 of the Oklahoma Constitution, the legislative department has become so grossly malapportioned that the ballot or vote of the plaintiff and those similarly situated, for the elected members of the Legislature, amounts to less than one-tenth of the sufferage of other citizens residing in the rural or more sparsely settled communities; that the Legislature has

repeatedly refused to reapportion itself in compliance with the constitutional mandate; that Initiative Petitions have failed and the judicial department has confessed its impotence to require compliance, as a consequence of which the plaintiff and his class must suffer the deprivation of due process of law and equal protection of the laws, with reference to taxation and the appropriation of public funds, to the serious impairment of his franchise. The prayer is that this Court recognize and enforce his right to an equal voice in his government, as a civil right within the meaning of the Constitution and laws of the United States; and that the Court declare the legislative department of the State of Oklahoma so malapportioned as to deprive its citizens of a republican form of government, and to deprive the plaintiff, and those similarly situated, the equal protection of the laws; that having so declared, the Court proceed to enjoin the State Auditor, State Treasurer, and Members of the Oklahoma Tax Commission from taking any official actions on appropriations or enactment of those claiming to exercise legislative authority; and, that if the plaintiff be mistaken in the remedy sought, he be then granted such remedy as will relieve and cure the evils from which he continues to suffer.

The plaintiff subsequently moved to make the Members of the State Election Board additional parties defendant, and amend his complaint to reiterate the deprivation of his franchise by the diminution or destruction of his vote, by reason of the refusal of the Legislature to reapportion itself, as commanded by the Constitution. Plaintiff specifically alleged that the Supreme Court of the State of Oklahoma had, on the 13th day of February, 1962, granted a writ of mandamus, directing the Secretary of the State Election Board, or his successor, to receive filings for the office of State Representative pursuant to the existing election laws, and to comply with any ministerial or other functions re-

quired by such laws. (House Bill 1033 of the Twenty-eighth Legislature, 14 O.S.A. §§ 45.1 *et seq.*, 71 *et seq.*, 90-101.)

The plaintiff asserts federal court jurisdiction of the subject matter under 28 U.S.C., Sec. 1343(3); that a justiciable controversy is presented; and, that the plaintiff has standing to maintain the suit. By way of immediate relief, the plaintiff seeks an injunction against the members of the State Election Board, to prevent them from certifying the names of candidates for nomination in the forth-coming May 1, 1962 primary election for the House and Senate from the existing districts, or in the alternative, an order directing the defendant Board Members to certify the said candidates for election by the State at large.

After the case was submitted and set for final disposition on Monday, April 23, 1962, M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes, Directors of Oklahomans For Local Government, an unincorported association, were permitted to intervene as necessary or proper parties to the suit. In their answer, it was alleged that the State Election Board had performed all ministerial and other functions required by it for the conduct of the forthcoming primary; that all further acts in relation to the pending primary election must be done and performed by the several County Election Boards of the State; and, that such Boards are, therefore, indispensable parties to the relief sought and the suit must, therefore, be dismissed. Further answering, the Intervenors deny the justiciability of the relief sought, as political in nature. They specifically deny that the present apportionment of the Oklahoma Legislature operates to deny the plaintiff and his class the equal protection of the laws, but if so, allege that ample provision is made by the Constitution and laws of the State of Oklahoma for constitutional reapportionment; that within the past two years, the people of the State had, at freely held elections, expressly rejected suggested revisions

of their apportionment laws; and, that at the last session of the Legislature, the House of Representatives, by legislative action, did reapportion itself and that such action was approved by the Governor of the State. It is further alleged that a reapportionment, as provided by the Oklahoma Constitution and effected by virtue of shifting and changing population of the State since the adoption of the Constitution, would result in an invidious discrimination against many citizens of the State, and deprive them of the equal protection of the laws. Finally, it is alleged that reapportionment under the Constitution of Oklahoma is vested exclusively in the Legislature; that the Governor of the State is vested solely with the power of convocation; and, that the Legislature is wholly impotent to reapportion, redistrict or reallocate its representation until January, 1963, unless the Governor is required by this Court to call the Legislature into extraordinary session.

Jurisdiction

Federal Court jurisdiction rests upon claimed redress for the deprivation, under color of State law, of a right or privilege secured by the equal protection clause of the United States Constitution. See 28 U.S.C., Sec. 1343. This Court is constituted and convened under 28 U.S.C., Sec. 2284, pursuant to 28 U.S.C., Sec. 2281, to hear and determine the suit, based upon the allegation of the unconstitutionality of the Oklahoma apportionment statutes and the prayer for interlocutory and permanent injunction, restraining the enforcement or operation of such statutes.

When the matter came on for hearing on the plea for temporary relief, the Election Board appeared in person and by counsel, and joined in the statement by counsel for the plaintiff in support of the allegations in the Petition. The State Treasurer, William A. Burkhart, appeared by counsel and confessed the material allegations in the Peti-

tion. Upon oral motion of the plaintiff in open court, the Governor of the State of Oklahoma, Honorable J. Howard Edmondson, was made a party defendant. He thereupon entered his appearance by his attorney, Norman Reynolds, and consented to be sued as a defendant in this action. The Oklahoma Tax Commission and Andy Anderson, State Auditor, appeared by their counsel, Fred Hanson, Assistant Attorney General.

Statement of the Case

At the bar of the Court, the parties freely conceded, as did the parties in *Radford* v. *Gary, supra,* that the Oklahoma Legislature had, since 1910, failed and refused to reapportion the State in compliance with the mandate of the Oklahoma Constitution. Our attention was called to the Reapportionment Act of 1961 (House Bill 1033) by which the House of Representatives purported to reapportion itself, and that the Oklahoma Supreme Court had adjudged it in non-compliance with the constitutional requirements, on the same grounds for which the prior apportionment acts were held deficient; but, that the Oklahoma Supreme Court had refused to enjoin filings and elections under it on the ground that elections under the pre-existing law would result in far greater inequalities of representation than elections under the 1961 Act. See *Jones* v. *Winters,* 369 P.2d 135 (Dec. 19, 1961). And, had ordered the Secretary of the State Election Board to receive filings for office of State Representative under and pursuant to the 1961 Act. *Brown* v. *State Election Board,* 369 P.2d 140 (Feb. 13, 1962). It also appears that in 1961, the Oklahoma State Senate attempted to reapportion the entire State for senatorial purposes, but the Act was declared invalid, and the Oklahoma Supreme Court directed the State Election Board to receive filings for the office of the State Senate, pursuant to the apportionment laws in existence since 1941. *Reed* v.

State Election Board, 369 P.2d 156 (Feb. 13, 1962); see also Memorandum Decision in No. 39937, *Ludlow* v. *State Election Board* (Feb. 13, 1962).

Speaking through his attorney of record, the Governor of the State of Oklahoma, represented to the Court that he was elected Governor on a program to reapportion the Legislature; that he had recommended reapportionment in compliance with the constitutional mandate to each legislative session during his administration; that he sponsored an Initiative Petition, aimed at constitutional compliance, on which the requisite signatures were obtained, but which was defeated at the polls on September 20, 1960; that as a defendant in *Ludlow* v. *State Election Board, supra*, and as *amicus curiae* in the other recent actions, *i.e.*, *Jones* v. *Winters, supra, Brown* v. *State Election Board, supra*, and *Reed* v. *State Election Board, supra*, he made suggestions concerning relief, which in his judgment were within the jurisdictional reach of the Oklahoma Supreme Court; that in his pleas to the Supreme Court, he had offered to convoke a special session of the Legislature, if that Court would assume jurisdiction and indicate its disposition to afford relief, in the event the Legislature failed to act.

The Governor also calls our attention to the pendency of another Initiative Petition to amend the Constitution, to transfer the enforcement of the constitutional apportionment formula from the Legislature to a Constitutional Apportionment Commission. We are told that the petition was filed in December 1961, bearing approximately 219,000 signatures; that a protest had been filed and is now pending before a Referee of the State Supreme Court; that in the last sixteen years, no Initiative Petition has received the required vote of the people and that, in any event, the pending petition cannot be voted upon in sufficient time to provide the basis for election of members to the Legislature for the 1963 session.

Based upon this experience, the Governor expressed the view that further attempts at reapportionment by legislative or intiative action would be vain and futile; that if the plaintiff and his class are to be afforded the equal protection of the laws, vouchsafed to them by the Constitution, they must find it here—that this Court is the only effective source of relief. Based upon this conviction, the Governor has willingly entered his appearance as a defendant in this case and now offers to convoke the Legislature in extraordinary session, under Article 6, Section 7 of the Oklahoma Constitution, for the specific purpose of enacting a system of election laws in consonance with constitutional requirements, or call a special election under Article 5, Section 20 of the Oklahoma Constitution and 26 O.S., Section 541, for the purpose of filling any vacancies resulting for failure of the forth-coming primary on May 1, 1962. It is suggested that the cost of any special election may be paid from appropriations from the Governor's contingency fund, and such funds are pledged for that purpose as the occasion arises.

The Election Board, responding through its attorney of record, represents that it is being required under mandamus of the Oklahoma Supreme Court to accept filings and conduct elections for the offices of both branches of the Legislature, in disobedience to the Constitution of the State of Oklahoma, and in violation of the equal protection clause of the Constitution of the United States—all in violation of their respective oaths of office. We are urged by the Election Board to grant the relief sought, as the only available and effective remedy.

The parties agree, as indeed they must, to the population of the State of Oklahoma, as evidenced by the 1960 Decennial Census, and to the distribution of the population by Counties, as shown by such census. They also agree to the representation of the Legislature by Counties and Districts,

and while the Intervenors do not seem to deny the allegations of the complaint to the effect that the apportionment of legislative representation to population results in a disparity of voting strength between the populous and sparsely populated voting districts, they specifically deny that such numerical inequality is invidiously discriminatory, and offer to prove that by reason of the peculiar economic and geographic characteristics of the presently constituted voting districts, the voting disparity is constitutionally justified, and rationally affords the citizens of the State of Oklahoma, including the plaintiff and his class, the equal protection of the laws.

Justiciability and Standing to Sue

A majority of the Court in *Radford* v. *Gary*, *supra*, denied relief in the face of a confessed deprivation of constitutional rights, under color of State law, because of the positive admonition to refuse to exercise our "equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *South* v. *Peters*, 339 U.S. 276, 277. Our decision was influenced by what seemed to be the prevailing view in *Colegrove* v. *Green*, 328 U.S. 549, and we were affirmed per curiam on authority of that case and *Kid* v. *McCandless*, 352 U.S. 902. Now, however, all such jurisdiction and justiciable doubts have been resolved by *Baker* v. *Carr*, — U.S. —, decided March 26, 1962. Jurisdiction of this Court to entertain the suit and to grant appropriate relief is no longer doubtful. Not only is our jurisdiction clear, but we are, indeed, importuned by all the parties, other than the Intervenors, in this suit to grant the long-sought and often denied relief, by some appropriate remedy.

The plaintiff and his class seek to protect or vindicate an interest of their own—"a plain, direct and adequate interest in maintaining the effectiveness of their vote," not

merely a citizen's interest in good government. See *Baker* v. *Carr*, Slip Op., p. 21. Having jurisdiction of a justiciable controversy, this Court is empowered to secure equitable or other relief for the denial of a constitutionally protected right.

The Case for Temporary Relief

As a prerequisite to any relief, it is, of course, incumbent upon the plaintiff to establish the unconstitutionality of the Oklahoma Apportionment Statutes, and plaintiff cannot sustain that burden by merely showing a disparity in the voting strength of the various electoral districts. Numerical inequality of voting strength does not necessarily prove a case for the deprivation of voting rights. An actionable deprivation results only from an invidious discrimination—a disparity without rationality. *McDougall* v. *Green*, 335 U.S. 281; *McGowan* v. *Maryland*, 366 U.S. 420; *Baker* v. *Carr*, *supra*. It seems fair to say, however, that a disparity of ten to one in the voting strength between electoral districts makes out a *prima facie* case for invidious discrimination, and calls for strict justification.

It must be conceded by all, that the present statutory apportionment does not comply with the Oklahoma Constitution. But, even so, a statutory apportionment which does comply with the State Constitution, does not, *ipso facto*, afford the equal protection of the laws, guaranteed under the Fourteenth Amendment. The test to be applied is found in the federal Constitution and, as we have seen, turns on the rationality of the apportionment.

No one has suggested that the challenged apportionment laws were conceived or enacted with the thought or purpose of affording substantial equality of voting rights, as between electoral districts. Until now, the Oklahoma Legislature has proceeded on the premise that the matter of allocating voting strength was strictly within their dis-

cretion, or even caprice. The Intervenors offer to show in retrospect a rational basis for the disparity, and they are, of course, entitled to their proof and they will be heard. Meanwhile, we can find no rational basis for saying that a vote in one electoral district which is worth ten times the vote in another electoral district for the same legislative body, affords the equal protection of the law to the disfavored voter. On the face of the present record, the apportionment for the State of Oklahoma appears to be closely akin to the "crazy quilt" apportionment in Tennessee.

This brings us to the matter of the appropriate relief to be afforded, pending the final determination of the case on its merits. A majority of the Court has reluctantly declined immediate interlocutory relief in the form of an injunction forbidding the forth-coming May 1, 1962 primary election, or alternatively, ordering the election to be conducted at large. Our reasons may be summarized as follows:

Because of the Intervenors' tendered issue of rationality, the drastic and unprecedented relief sought is deemed inappropriate. The effect of such an injunctive decree would be to disrupt a long established electoral system on unsettled facts.

Moreover, there is some question concerning the effectiveness of an injunctive decree, in view of the fact that candidates for the legislative offices have already been certified to the County Election Boards for the conduct of the election and the canvassing of the votes. Indeed, we are told that some of the candidates for the offices involved are unopposed, either in the forth-coming primary or the general election, and are, therefore, presently entitled to a certificate of election. In order to give uniformity of relief, it would thus be necessary to in some way void these certificates of election, and declare these offices vacant. The

result would likely be confusion and chaos, and provocative of interminable litigation.

Additionally, we have no assurance that the present Legislature, even if convened in extraordinary session, would enact a constitutionally acceptable system of apportionment and election laws for the nomination and election of its successors, prior to the 1963 session. In which event, under the provisions of the Constitution of the State of Oklahoma, the present members of the Legislature would continue to hold their offices until their successors were elected and qualified—presumably in 1965. See Article 23, Section 10, of the Oklahoma Constitution. It would be an awkward and clumsy thing for this Court to undertake to reapportion and redistrict the Legislature of the State of Oklahoma, in accordance with some judicially devised formula, and even more difficult to attempt to supervise specal nominations and elections to the reapportioned Legislature. Certainly, we should undertake this essentially legislative function only as a last resort.

This does not mean, however, that the task is insurmountable or that we will not undertake it, if the circumstances ultimately compel it, nor does the denial of immediate relief herein mean that the present Legislature should not be afforded an opportunity to enact prospective reapportionment laws, in accordance with the supreme law of the land, as announced in *Baker* v. *Carr, supra*, and to which we all owe allegiance and are amenable. The Legislatures of other states have taken appropriate action to compiy with the constitutional requirements, when faced with the inescapable duty of doing so. See *Asbury Park Press* v. *Woolley*, 161 A.2d 705; *Application of Lamb*, 169 A.2d 822; *MaGraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184, 177 F. Supp. 803. See also *Sims, et al.* v. *Frink, Secretary of State of Alabama, et al.* (April, 1962) (C.A. 5). Meanwhile, this case will proceed to issue and determination on its merits, with all deliberate speed.

APPENDIX II.

DISSENTING OPINION OF JUDGE ROSS RIZLEY

Endorsed: Filed April 30, 1962
Vera L. Howard, Clerk
By Cecil A. Qualls, Deputy

I deeply regret that I am unable to agree with my distinguished colleagues and brethren, who constitute this three-judge court, to the effect that by delaying the relief prayed for by the plaintiff until at least 1965 complies with the intent or the spirit of the law announced in *Baker* v. *Carr*.

Actually this class action now before us for consideration is a sequel to *Radford* v. *Gary*, 145 F. Supp. 541, in which another named plaintiff assailed the Oklahoma Apportionment Statutes for the election of members to the Oklahoma State Legislature, as violative of the Oklahoma Constitution and a deprivation of the equal protection laws, vouchsafed to him by the Fourteenth Amendment to the United States Constitution. Like the named plaintiff in the *Radford* case, the plaintiff here is a citizen and resident of Oklahoma, and a qualified voter of the most populous county in the State. As such representative citizen and voter the plaintiff in the instant case claims that because of the shifting population of the State of Oklahoma from the rural sections to the cities and urban areas, and because of the failure and refusal of the Legislature to reapportion its members as required by Article 5, Section 10 of the Oklahoma Constitution, the legislative department has become so grossly malapportioned that the ballot or vote of the plaintiff and those similarly situated, for those elected members of the Legislature, amounts to less than one-tenth of the suffrage of other citizens residing in the rural or more sparsely settled communities. He says that the Oklahoma Legislature has repeatedly refused to reapportion itself in

compliance with the constitutional mandate, that Initiative Petitions have failed, and that the Judicial Department of Oklahoma has confessed its impotence to require compliance, as a consequence of which the plaintiff and his class must suffer the deprivation of due process of law and equal protection of the laws, with reference to taxation and the appropriation of public funds, to the serious impairment of his franchise; and that unless this Court recognizes and enforces his right to an equal voice in his government, as a civil right within the meaning of the Constitution and the laws of the United States, the Court will be depriving the plaintiff, and those similarly situated, of equal protection of the laws.

Subsequent to the filing of his original complaint, the plaintiff moved to make the Members of the State Election Board additional parties defendant and amended his complaint to reiterate the deprivation of his franchise by the diminution or destruction of his vote by reason of the failure of the Legislature to reapportion itself, as commanded by the Constitution. By way of immediate relief, he sought an injunction against the members of the State Election Board to prevent them from certifying the names of candidates for election to the House and Senate from the now existing districts, or ancillary to such relief, that the Court order said Board Members to certify the said candidates for election by the State at large.

At the trial of this case, upon oral motion of the plaintiff in open court, the Governor of the State of Oklahoma, The Honorable J. Howard Edmondson, was made a party defendant. He thereupon entered his appearance by his attorney, Norman Reyonlds, and consented to be sued as a defendant in the action.

Subsequently and after the Court had announced in open court that the case was submitted, the intervenors appeared and asked permission to intervene. They were given

permission to intervene with the explicit understanding that they must present themselves within the issues as they had been defined by the Court and only upon that condition.

At the bar of the Court the parties freely conceded, as did the parties in *Radford* v. *Gary*, that the Oklahoma Legislature had, since 1910, failed and refused to reapportion the State in compliance with the mandate of the Oklahoma Constitution. Likewise our attention was called to the Reapportionment Act of 1961 (House Bill 1033) by which the House of Representatives purported to reapportion itself, and that the Oklahoma Supreme Court had adjudged it in non-compliance with the constitutional requirements on the same grounds for which prior apportionment acts were held deficient; but, that the Oklahoma Supreme Court had failed to enjoin filings and elections under it on the grounds that elections under the pre-existing law would result in far greater inequalities of representation than elections under the 1961 Act. See *Jones* v. *Winters*, 369 P.2d 135. And, had mandamused the Election Board to receive filings for the office of State Representative under and pursuant to the 1961 Act, *Brown* v. *State Election Board*, 369 P.2d 140.

It also appears that in 1961 the Oklahoma State Senate attempted to reapportion the entire State for senatorial purposes, but the Act was declared invalid, and the Oklahoma Supreme Court directed the State Election Board to receive filings for the office of the State Senate, pursuant to the apportionment laws in existence since 1941. *Reed* v. *State Election Board*, 369 P.2d 156 (Feb. 13, 1962); see also Memorandum Decision in No. 39937, *Ludlow* v. *State Election Board* (Feb. 13, 1962).

Speaking through his attorney of record, the Governor of the State of Oklahoma, represented to the Court that he was elected Governor on a program to reapportion the

Legislature; that he had recommended reapportionment, in compliance with the constitutional mandate, to each legislative session during his administration; that he sponsored an Initiative Petition, aimed at constitutional compliance, on which the requisite signatures were obtained, but which was defeated at the polls on September 20, 1960. He further represented that, as defendant in *Ludlow* v. *State Election Board, supra,* and as *amicus curiae* in other recent actions, *Jones* v. *Winters, supra; Brown* v. *State Election Board, supra;* and *Reed* v. *State Election Board, supra,* he made suggestions concerning relief, which in his judgment were within the jurisdictional reach of the Oklahoma Supreme Court; that in his pleas to the Supreme Court, he had offered to convoke a special session of the Legislature, if the Supreme Court would assume jurisdiction and indicate its disposition to afford relief, in the event the Legislature failed to act.

The Governor also called the Court's attention to the pendency of another Initiative Petition to amend the Constitution, to transfer the enforcement of the constitutional apportionment formula from the Legislature to a Constitutional Apportionment Commission, and we were told that the petition was filed in December, 1961, bearing approximately 219,000 signatures, and that a protest has been filed and is now pending before a Referee of the State Supreme Court. The Governor's representative also stated that in the last sixteen years no Initiative Petition has received the required vote of the people and that, in any event, the pending petition could not be voted upon in sufficient time to provide the basis for election of members to the Legislature for the 1963 session.

Based upon this experience, the Governor expressed the view that future attempts at reapportionment by legislative or initiative action would be a vain and futile gesture; and that if the plaintiff and his class are to be afforded the

equal protection of the laws, vouchsafed to them by the Constitution, they must find it here—that this Court is the only effective source of relief. Based upon this conviction, the Governor willingly entered his appearance as a defendant in this case and offered to convoke the Legislature in extraordinary session, under Article 6, Section 5 of the Oklahoma Constitution, for the specific purpose of enacting a system of election laws in consonance with constitutional requirements, or call a special election under Article 5, Section 20 of the Oklahoma Constitution and 26 O.S. 61, Section 541, for the purpose of filling any vacancies which might result from failure of the forthcoming primary on May 1, 1962, as provided by present law. Through his spokesman, the Governor suggested that the cost of any special election could be paid for from appropriations from the Governor's contingency fund, and said funds are pledged for that purpose as the occasion arises.

The Election Board, responding through its attorney of record, represented that it is being required under mandamus of the Oklahoma Supreme Court to accept filings and conduct elections for the offices of both branches of the Legislature, in disobedience to the Constitution of the State of Oklahoma and in violation of the equal protection clause of the Constitution of the United States—all in violation of their respective oaths of office.

It seems to me perfectly clear, from all of this, that electorial representation in both branches of the Oklahoma Legislature, under the apportionment statutes now in existence, are invidiously discriminatory and operate to deprive the plaintiff and those of his class of the equal protection of the laws.

A majority of the special three-judge court, as now constituted, denied relief in *Radford* v. *Gary*, *supra*, in the face of a confessed deprivation of constitutional rights, under color of State law, because of what seemed to us a

positive admonition to refuse to exercise our "equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *South* v. *Peters*, 339 U.S. 276, 277. Our decision was influenced by what seemed to be the prevailing view in *Colegrove* v. *Green*, 328 U.S. 549, and we were affirmed per curiam on authority of that case and *Kid* v. *McCandless*, 352 U.S. 902. Now, however, all such jurisdiction and justiciable doubts have been resolved by *Baker* v. *Carr*, decided March 26, 1962. Jurisdiction of this Court to entertain the suit and to grant appropriate relief is no longer questioned. Not only is our jurisdiction clear, but we are, indeed, importuned by the plaintiff and the defendants to grant the long-sought and often denied relief by some appropriate remedy. Only the intervenors, which assume another name but are in fact members of the Oklahoma Legislature, are objecting.

As previously stated, the State Election Board, having been mandamused to proceed, has in fact gone ahead with election procedures and has accepted filings and certified those filings to the County Election Boards, where they will be placed on the County ballots and distributed to the precincts for the May 1 election. Also, in instances where legislative candidates were unopposed, certificates of nomination have been issued to such unopposed candidates in compliance with 26 O.S.A. 166. Having proceeded thus far under the order of the Supreme Court of Oklahoma, the Board was made a party defendant in this case in the Western District of Oklahoma, wherein the plaintiff has sought to enjoin the May 1 primary because his Federal Constitutional rights would be violated by the malapportionment which would be perpetuated by the primary election under existing apportionment laws.

As we understand the position of the Election Board in this case, although formally an adversary of the plaintiff,

the defendant Board is substantially sympathetic with the plaintiff's cause, and while it has not voluntarily urged the Court to restrain it from acting, it has clearly pointed out that for it to act on May 1 would be for it to further violate its oaths to uphold the Constitution of the United States and of the State of Oklahoma, and it believes and urges that existing apportionment laws are in violation of the 14th Amendment to the U. S. Constitution and thus clearly unconstitutional.

The majority says, that even though admittedly the present apportionment does not comply with the Oklahoma Constitution and constitutes invidious discrimination under Oklahoma Law, that we should not grant temporary relief because the plaintiff has not made a *prima facie* case of invidious discrimination so far as the Constitution of the United States is concerned. The issues as defined and confined admit that present apportionment laws show a disparity of ten to one in the voting strength between electoral districts. The Oklahoma Supreme Court has so found and held.

In my opinion it is stretching the point to absurdity for this Court to say that such disparity of voting strength and equality does not within itself make a case of invidious discrimination under the 14th Amendment of the Federal Constitution.

"Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State, according to the prescription of the organic law. To the extent that his county is given a lesser number of members in the lower House than are its due, his vote diminishes in value, and thus he does not receive the full measure of protection and representation which are of the essence of democracy. No man can boast of a higher privi-

lege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our Constitution that right is absolute. It is one of which he cannot be deprived either deliberately or by inaction on the part of a Legislature. Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." See *Asbury Park Press, Inc.* v. *Wooley*, 161 A.2d 705, pp. 709-710.

Finally, the majority says that to enjoin the May 1 primary would likely cause confusion and chaos and be provocative of indeterminable litigation because, they say, some of the members of the Legislature have already been issued certificates of nomination and many others will be after the May primary. It is hard for me to follow the thinking of my brothers—that by condoning elections in unconstitutional districts, and thus encouraging more certificates of nomination and election, we are thus curtailing chaos and confusion and preventing provocative and indeterminable lawsuits. It could well be argued that under Oklahoma law an election certificate is conclusive. *State ex rel. Love* v. *Smith*, 142 Pac. 408.

Can an Election Be Enjoined?

Intervenors have cited an Oklahoma case (221 Pac. 779) to the effect that an election cannot be enjoined even if it is an illegal election. The Oklahoma Constitution provides in Article 3, Section 7 that no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage. However, I believe and so hold that legal

elections under constitutional laws shall not be enjoined but that the constitutional provision just mentioned would not inhibit the exercise of injunctive relief to halt an election under invalid and unconstitutional laws, which laws themselves strike at the very heart of the freedom and equality of suffrage prescribed by Article 3, Section 7 of the Oklahoma Constitution.

If the Election Board were enjoined from proceeding with the May 1 primary, it would be a simple enough matter for it to rescind and cancel the certifications of filings and of nominations heretofore issued. It could do this under its general power to act in the first place with regard to those certifications, and certainly it could do so if the Court, in its interlocutory decree, declared such certifications invalid.

After an Injunction, What?

What could be done if interlocutory relief is granted? I do not believe that the holding of at large elections is a practical interim answer, however, proper apportionment should and could be made and primary elections held in ample time for the general election in November, 1962. Certainly it is worthy of note here that a three-judge court in Alabama, while refusing to give interlocutory relief, had this to say, "The application is continued and re-set for hearing at ten o'clock on Monday, July 16, The hearing cannot be set for a much later date because, if this Court is to act effectively, some action must be taken in ample time before the general election of November, 1962."

I respectfully suggest that the majority in this case offers no relief other than a lecture to the members of the legislative body that they have a duty to act and ought to act, that they ought to do it in a special session, but, if not, in the next regular session to begin in 1963, and that

this Court will merely retain jurisdiction to see what the Legislature does.

Primary elections under existing apportionment laws should be enjoined. This Court should retain jurisdiction of the case and same should be continued to a day certain in mid or late summer. In its interlocutory decree, the Court should find that there has been at least a *prima facie* showing that existing apportionment laws are invalid and unconstitutional by both the State and Federal Constitutional yardsticks. The Court should strongly indicate that legislative reapportionment should be immediately forthcoming. The injunctive decree would serve as a sufficient stimulus for the calling of a special session of the Legislature by the Governor. In this connection, only the Governor can call a special session. The Legislature cannot convene itself. See Article 6, Section 7 of the Constitution of Oklahoma and the cases annotated thereunder.

If the Legislature met under such circumstances, it is highly probable, in view of an interlocutory decree, that the Legislature would reapportion itself and set new primary election dates and filing periods for the holding of valid and constitutional legislative elections in 1962. There is no question as to the Legislature's power to make the apportionment and prescribe the form, time and manner of primary and general elections. See Article 3, Sections 4, 4a, 5 and 6 of the Oklahoma Constitution. Certainly ample time remains for the Legislature to make the apportionment according to law and implement such so we could have primaries and a general election that would be legal as applied to the Legislature.

Should there be no special session, or should the Legislature fail to act, then the Court should proceed to hear the case on its merits. Assuming that the Court found that existing malapportionment violates the Fourteenth Amendment to the United States Constitution, the Court should

make the apportionment itself under its plenary equity powers and in the light of Article 5, Section 10(j) of the Oklahoma Constitution. I believe that the extraordinary powers to review are so broadly stated therein as to include the power to revise; else, the rights of citizens who are wronged would be without redress or remedy, and this section of the Constitution would be empty and vain.

The making of the apportionment by the Court will in no sense constitute an invasion of the province of the Legislature. It will not be judicial legislation. This is so because the apportionment would be made in order to achieve that substantial equality of representation which is spelled out as a formula in the Oklahoma Constitution. The Court would simply apply the formula to the Federal census figures of 1960. That application would be a mere ministerial act to be performed by the Court, or a special master. The Court has the power and could direct the defendant Board in this case to apply the formula and make the necessary districts for the House and Senate.

The sole question at issue is whether or not plaintiff's rights to substantial equality of representation, as expressed in the equal protection clause of the Constitution of the United States, will be violated if an election is held on May 1 under existing apportionment laws. All parties to this action have stipulated as to the essential facts.

Although intervenors proposed to introduce some evidence about the rationality of the existing apportionment, when given the opportunity to do so, they quickly reneged, pleading that they were not ready to introduce evidence, notwithstanding the fact that certain members of the Legislature were then in the courtroom and that intervenors had themselves filed their motion to intervene and proposed answer three days before the hearing.

The intolerable condition of malapportionment has existed for fifty years in Oklahoma. For twenty years the

Supreme Court of this State has said that existing apportionment does not comply with the Constitution and it has expressed hope that succeeding Legislatures would do something about it. Twenty years have passed and nothing has been done. On May 1 the people of Oklahoma will, in the absence of interlocutory relief, again nominate and later elect a Legislature which will be so badly misapportioned that the rights of all of the citizens of Oklahoma to the equal protection of the laws will be denied. That election should be enjoined. The Court now has the power to cure the cancer of malapportionment. To refuse to exercise this power and to hope that sometime in the future some malapportioned Legislature will cure itself of this disease is the same kind of fond hope expressed by the Supreme Court of Oklahoma twenty years ago.

There will be no special session of the Legislature if interlocutory relief is denied. The next regular session of the Legislature will be as malapportioned as its predecessors. That it will act in accordance with constitutional standards is entirely speculative.

Here and now the constitutional rights of citizens are being violated and will again be violated on May 1. This Court's duty is simply to declare that there is at least a grave question as to the constitutionality of existing apportionment under the Federal Constitution and to enjoin the May 1 primary. To temporarily halt an illegal and unconstitutional election is not to deny the rights of suffrage, but is to stimulate the proper constitutional agencies of government to do that which the Constitution declares should be done. If we are to continue to live under a constitutional government, the Constitution must be followed by every citizen and every agency of government. This Court's duty is to measure the actions of citizens and government alike by the Constitution and to enjoin without equivocation any purported action of citizens or govern-

ment which does not measure up to plain constitutional requirements.

The evil pointed up by this case is not new. Our would-be republican form of government has long been stigmatized by this same die-hard political parasite. The refusal of a Legislature, such as the one in view, to voluntarily comply with the clear mandates of the State Constitution, to which such body owes its existence, is inexcusable and demonstrates anarchic contempt for the ideal that this government continue as one of high-principled laws rather than degenerate into one of unprincipled men.

As a member of this court, I refuse to condone a Legislature which exists from districts declared by our own Supreme Court to be unconstitutional. I refuse to put the judicial stamp of approval on holding further unconstitutional elections for the members of the State Legislature.

I most respectfully dissent.

Ross Rizley
Ross Rizley, Judge
United States District Court
For the Western District of Oklahoma

APPENDIX III.

INTERLOCUTORY DECREE

Endorsed: Filed Jun. 19, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

Be it remembered, that this class action came on regularly for hearing June 12, 1962, pursuant to notice, on the petition of the Plaintiff and his class to annul the apportionment statutes of the State of Oklahoma, as violative of the equal protection clause of the Constitution of the United States, and a deprivation of his and their civil rights under 28 U.S.C. §1343. The parties appearing in person, or by counsel, as indicated in the former hearing. The Court having received evidence and having taken judicial notice of pertinent matters, and being fully advised in the premises, doth find and conclude:

1. That this specially constituted three-judge Court has jurisdiction of the subject matter and of the parties, with the power to hear and decide the controversy presented by the pleadings.

2. The Court is of the opinion that the existing statutes of the State of Oklahoma, relating to apportionment for the nomination and election of the members of both houses of the Oklahoma Legislature are invidiously discriminatory against the Plaintiff and his class; hence, null and void.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O.S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections.

IT IS FURTHER ORDERED that this cause be continued until July 31, 1962, for the effectuation of appropriate relief and final judgment.

/s/ Alfred P. Murrah
Circuit Judge

/s/ Ross Rizley
District Judge

/s/ Fred Daugherty
District Judge

APPENDIX IV.

Before MURRAH, Circuit Judge, and RIZLEY and DAUGHERTY, District Judges.
MURRAH, Circuit Judge.

FURTHER STATEMENT OF FACTS AND LAW ON THE MERITS

Endorsed: Filed Jun. 19, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

When this case came on for hearing on motion for temporary relief, we held the complaint sufficient to state a justiciable controversy, cognizable under 28 U.S.C. §1343, of which this three-judge Court has jurisdiction under 28 U.S.C. §2284, pursuant to 28 U.S.C. §2281. We expressed the view that a numerical disparity of as much as ten to one in legislative electoral districts, raised a serious question of malapportionment, which may very well constitute a prima facie case for invidious discrimination.

The Intervenors offered to show in retrospect a rational basis for the disparity, and we denied temporary injunctive relief and ordered the case to proceed to issue and trial on its merits "with all deliberate speed."

The case now comes on for trial on its merits, the parties appearing in person or by counsel, as in the former proceedings. From the stipulations, evidence, and other facts of judicial notice, we find that there has been only token reapportionment by the State of Oklahoma of its legislative body since 1911. Both branches of the Legislature have consistently disregarded the provisions of the State Constitution, with respect to reapportionment, with no thought of affording the equal protection of the laws. While there have been a number of attempts to reappor-

tion by Initiative Petition and Referendum, all such proposals have been defeated at the polls. There is now pending in the Supreme Court of Oklahoma, a further Initiative Petitron, providing for constitutional reapportionment through the medium of a Reapportionment Commission. This petition has been vigorously opposed by the Intervenors in this case, and has been pending in the courts for more than five months.

The application of the 1960 Federal Census in Oklahoma to existing legislative apportionment, graphically demonstrates the present numerical disparity in the relative weight of the votes cast for respective members of the Legislature. By reference to this census, as applied to the present legislative apportionment, one vote for legislative Representative in Cimarron County is equal to fourteen votes for the same office in Oklahoma County, and eleven votes in Tulsa County. The numerical disparity existing in the Senatorial Districts is even greater. For instance, one vote in Senatorial District No. 26, comprising Love and Marshall Counties, equals 26.4 votes in District No. 31, comprising Tulsa County. The facts reveal that 61 members of the House of Representatives, constituting a majority, represent 26% of the total population of the State. The other 60 members of that House represent 74% of the population, or an average of 28,642 persons per Representative. Reduced to its simplest terms, this means that a majority of the Legislature is responsible to only 26% of the population and that the remaining Representatives represent 74% of the people.

Applying this analysis to the State Senate, it will be seen that nine Senators represent 52% of the people, or an average of 128,642 persons per Senator; the other 35 Senators represent about 48% of the population. In terms of voting strength, this means that a great majority of the Senators are answerable to slightly less than one-half

the people, and that nine of the 44 Senators represent 52% of the population.

Approaching these statistics from another point of view, all but 15 of the 77 districts are over-represented, when their actual population is compared to that which would be required to make up the State constitutional ratio, under the present census. Summarizing further, the facts reveal that there are discrepancies under present apportionment of as much as twenty-six to one, in the weight of an individual vote.

While mere numerical disparity in voting strength is not, per se, invidiously discriminatory, it is, to be sure, cogent evidence of it and, as we have seen, may be sufficiently disproportionate to constitute a prima facie showing. This is so, we think, because under our democratic institutions and republican form of government, the suffrage right of the individual is, and must be, the keystone—the common denominator, of self-government. Indeed, the framers of the Oklahoma Constitution recognized this inalienable principle by providing that population should be the primary basis for electoral diffusion. See: Article 5, Section 9 and 10, of the Constitution of the State of Oklahoma. Under the Oklahoma Constitution, the principle of numerical equality is the rule, and any deviation is the exception. *Jones* v. *Freeman*, 146 P.2d 564. We think this principle should also be our guideline in determining whether the equal protection of the laws has been honored in the State electoral processes. There may be relevant counter-vailing factors, such as geography, economics, mass media and functional or group voting strength. But none of these factors, whether considered separately or collectively, can overcome the basic principle underlying the right of an individual to cast an effective vote. See: Excerpts from testimony of Dr. Joseph Pray, attached hereto as Appendix.

Intervenors have specifically denied the irrationality of the existing numerical disparity and contend that apportionment in accordance with the mandate of the Oklahoma Constitution would operate to deprive them of the equal protection of the laws. They seem to say that any deviation from the present apportionment would be a deprivation of their rights. In sum, they claim a Federal constitutional right in the present apportionment.

Before this case came on for hearing, Intervenors moved for a continuance, and renewed the motion on the hearing date, in order to obtain sufficient time to correllate and evaluate what they considered competent data, justifying the existing apportionment. Particularly, they set forth eight (8) separately numbered categories of statistical data and information, allegedly requiring additional time for compilation. An examination of each of these categories reveals that all of the suggested data or information is, and has been, at all times readily available in the form of public records to the Intervenors or, for that matter, to any interested person. Moreover, it may be that the suggested factors are a product of, rather than a rational basis for, the existing discrimination. Surely, one may not acquire a constitutional right to a status, which is created by the persistent disregard of constitutional precepts. In short, the Intervenors may not pull themselves up by their own constitutional bootstraps. Additionally, it should be noted that more than fifty days have elapsed since the denial of temporary relief and the case was ordered to trial on its merits. Even so, we cannot believe that Intervenors have been prejudiced in any manner by the unavilability of any information which they say is pertinent. We are thus brought to the conclusion that if the Intervenors have a defense, based upon the rationality of the present apportionment, they have not diligently pursued it. The continuance was consequently denied.

On this record, the Court concludes that the existing apportionment of the offices of both houses of the Oklahoma Legislature is grossly and egregiously disproportionate, and without rational basis or justification in law or fact. We conclude that the apportionment of the Legislature of Oklahoma, under and by virtue of its apportionment statutes is invidiously discriminatory against this Plaintiff and his class of voters, and all such statutes are, therefore, unconstitutional and void.

The Plaintiff and his class are entitled to appropriate equitable relief, which will substantially insure the numerical reapportionment of the Oklahoma Legislature, in a manner to accord the Plaintiff and his class the equal protection of the laws, guaranteed by the Fourteenth Amendment. The Court has not heard evidence on the appropriateness of the relief, and the matter is set for further hearing on the 31st day of July, 1962, for the purpose of determining the form of relief to be granted. Meanwhile, it seems desirable to note some of the suggested remedies, to which the Plaintiff may be entitled:

1. Reapportionment by the Legislature itself. This, of course, is the most desirable and the most efficacious, for, as we have said, the constitutional duty rests first and foremost upon the legislative body, whose duty it is to observe and comply with the supreme law of the land, as it is judicially construed and applied.

2. Initiative and Referendum. We, of course, have in mind the pending Initiative Petition as a possible available remedy, but the right asserted here cannot be made to depend upon the will of the majority. It is founded in the Federal Statute, which gives redress for the deprivation of civil rights, including the integrity of the ballot.

3. Reapportionment by Judicial intervention, either by some judicially devised formula or election at large until constitutional apportionment is achieved by legislative ac-

tion. Neither of these alternatives are desirable, and will be resorted to only if the Legislature fails to constitutionally reapportion itself, so as to afford equal protection of the laws. In that connection, it should be noted that there is ample time for the Governor of this State to call the present Legislature into extraordinary session for the specific purpose of enacting a system of reapportionment laws, which will comply with the requirements of the equal protection of the laws. In this manner, the Legislators will be free to act, unencumbered and unentangled with the legislative problems which will confront the general session, convening early in 1963. If, therefore, the Legislature is in special session, or has been called before the date fixed herein for final judgment, the case will be continued until September 10, 1962 to await legislative action.

If and when, in the course of this litigation, it becomes necessary to bring about constitutional reapportionment by direct judicial action, it will be time enough to hear and consider any counter-vailing factors, which may enter into the equation of reapportionment, based essentially upon population. Until that day, the judicial hand is stayed.

[*Appendix to further Statement of Facts and Law on the Merits*]

Excerpts from the Testimony of Dr. Joseph Pray, at the Hearing held June 12, 1962

Q. (By MURRAH, C.J.) Doctor, may I ask you a question which, in my judgment, goes to the heart of this lawsuit. You understand that the plaintiffs in this case, who are qualified electors in a populous County in the State, are here complaining that the present apportionment laws of the State of Oklahoma operate to invidiously discriminate against them in the exercise of their voting rights. You also understand this Court is empowered to hear and determine that complaint, and what we are now seeking to determine

is whether or not the present apportionment laws of this State infringe the equal protection clause of the Fourteenth Amendment, in that it invidiously discriminates against these plaintiffs. You understand that?

A. (By Dr. Joseph Pray) I do, yes sir.

Q. The Supreme Court of the United States has said that the equal protection of the laws, guaranteed by the Fourteenth Amendment, does not assure a proper diffusion of political initiative as between its thinly populated Counties and those having concentrated populations. You understand that?

A. Yes sir, I understand diffusion.

Q. * * * (T)he Courts have said that the equal protection of the laws does not require a State to achieve numerical equality with exactitude. That is to say, there may be some disparity between one County and another, so long as it doesn't amount to invidious discrimination.

A. Yes sir.

Q. That is the key word; and if we analyze what invidious discrimination means, then we quite understand what the Courts are talking about. Now then, we have the proof here, and it stands undisputed, that there has been no reapportionment since statehood. Meanwhile, as you know, we have had a rather radical shift in population into the metropolitan centers of the State, and so we stand here on the facts, with a wide disparity of representation on a ratio which is shown here as much as one to 26. You understand that fact?

A. Yes, sir.

Q. Now then, on a population basis, and the facts before this Court demonstrate beyond any doubt, that there

—is a wide disparity in population with respect to representation, in ratio, to representation in the legislative body. My question is, what other factors should the science of government take into consideration, and therefore, what other factors should this Court take into consideration in terms of equal protection of the laws, to assure a proper diffusion of political initiative? What factors, other than numerical representation, should we take into consideration? You could help this Court immeasurably, if you would enlighten us on that.

* * * * * * *

A. This is a fundamental question. * * * It goes very much to the heart of the whole issue, and I am thinking of Baker versus Carr and the majority and minority opinions, and the various views expressed there. * * * We are going to come back to this problem many, many times in the next five years, but I did refer to this, it seems to me, possibly anticipating this question, when I talked about the necessity to start at some place when it comes to the diffusion of political power. This is the key to politics. * * * To start at some place where the common denominator is the individual. We are talking about human society. The study of politics, particularly in recent years, has been very much interested in not who has suffrage, but who is influential in the legislative arena, the subject of pressure groups for instance, how influential they are, and how does a person go about getting enough campaign funds or how to run an effective campaign, it goes into the question of mass communication. It refers to whether the plaintiffs, being in an urban area, don't have counter-vailing facilities at their disposal. The metropolitan press has been a matter of great contention in a State like ours. It is hard to tell whether it helps you or hurts you. It has been a question of

whether this large group was more significant than this little person, who may or may not be their representative. Take the majority position in Baker versus Carr, in terms of when you should presumably strike down an apportionment scheme, if there is no rational basis.

Q. We are asked to strike down the present statutory apportionment on the ground it operates invidiously to discriminate against this particular plaintiff and those like him.

A. The operation of the scheme?

Q. Yes, the operation.

* * * * * * *

A. * * * The majority view stresses the suffrage phase of this question. This is a very important point to me, to the extent of what you had in Tennessee, and which is not different much from our situation, it seems to me.

A. * * * And to the extent you have one to 26, you have a diffusion of suffrage power which is as bad as if the vote was not counted because of fraud or some other reason it would also violate it, or if the discrimination on suffrage grounds was based on race, let us say, the white primary cases are especially, as long as you look at it in terms of whether or not this vote is being made effective, and you appreciate that our National constitution, for various reasons, calls for our votes being made effective. This sort of thing, and this sort of analogy, which, I think, is a very good analogy, when it takes into consideration there are people being affected because their votes—this sort of thing wouldn't condone much interference with the basis of numbers.

Q. Nor any room for tolerance?

A. Not any room for tolerance. * * * There is a rough and ready relationship here which some how is a necessity, if you think a person's vote should be counted. Now about these counter-vailing factors which come regularly. I think society will have to take care of those other ways but again when we divide the access to power by giving people the right to vote, the privilege of voting although some authority disregard it, you can bring these counter-vailing factors in. Some place you have to start in a Democracy with the general principle of numerical equality.

* * * * * * *

Q. * * * assuming one County traditionally casts * * * a much higher percentage of its qualified electors, and the populous County doesn't. Can we take that into consideration?

A. One doesn't exercise its right—

Q. Declining the constitutional right to do so if he chooses. Is that what you are talking about?

A. I will say you cannot take that into consideration. * * *

* * * * * * *

Q. May I ask you this question: As I understand the testimony today, as stated a moment ago, we have a wide disparity in America. That stands, either admitted or not. Do you think of any other factors by which this Court could justify it in terms of equal protection of the laws?

A. In other factors but numbers?

Q. Yes. Any other factors that would justify or by which this Court could say in the fact of this * * * obvious disparity, that it may be justified as affording the equal protection of the law?

A. I don't think so. I will make one little modification in a minute but the experience with functional representation where it has been tried in Europe as part of their legislative process. * * * This is a thing Germany tried for years * * * on the assumption (of) * * * working out a system of representation which is mostly more vital because some of the dynamic aspects of political decisions go off on organized efforts rather than the efforts of individuals; when you try functional representation. * * *

Q. Will you explain what you mean by functional?

A. The use of an economic council which would set up an individual body instead of individuals and based on the representation of the dynamic economical groups in the state and one of the legs this thing falls back on; to keep that representation, three per cent or whatever it is. Would it be three per cent ten years from now and so on? The political groupings of dynamic interest groups in our political life is a rapidly changing arrangement. They have come to the fore very significantly today and not so much tomorrow. * * * This is a prime example of using other groups rather than the individual, economic representation. It has bogged down because political decision has to be made somewhere. * * * You start with the individual and you try to adhere to him, as a basis rather than use a functional group. If you built in a favorable position for a favorable minority group, how would you get rid of it? How would the dynamics be developed if you would regroup it?

Q. Under our system of government the dignity of the individual is recognized and the individuals are here * * * asserting a personal right in that connection, and, of course, we are concerned not with classes so much as we are the dignity of the individual and his personal

right to vote and have his vote counted. That is our inquiry and that is our concern. Then as I understand your testimony, and I certainly don't wish to put any words in your mouth, as I understand your testimony, you say as a student of the science of government and as a student of our particular problem here, do you not think that economic or political factors that enter into the equation are such as would justify the numerical disparity?

A. Justify going against the numerical arrangement?

Q. Yes.

A. I don't. I do not think there should be any group.

Q. Do you know of any factors?

A. There is no question but what minority groups, and it might be an urban minority or a rural minority, the minority groups will struggle like everything to get more power, decision making or whatever their members call it. So there will always be this striving, that is assured, but this should not be the starting point. You should start with the individual and dignity of the individual and all of that.

Q. Something that approximates numerical equality.

A. Yes.

Q. Is that your starting point?

A. The starting point is there.

APPENDIX V.

DECREE

Endorsed: Filed Aug. 3, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

The above matter came on for hearing pursuant to assignment on the 31st day of July, 1962, on the Motion to Alter or Amend Decree, filed by the Intervenors M. A. Price, et al., Directors of Oklahomans For Local Government, an unincorporated association, and for a consideration of the various remedies for reapportionment suitable for implementation in view of the previous Interlocutory Decree entered by this Court on June 19, 1962.

The said Motion to Alter or Amend Decree is overruled, except by way of clarification it is the order of the Court that the scheduled general election, to be held on November 6, 1962, is not affected by the order of this Court entered on June 19, 1962 to the effect that the laws under which the present legislature of Oklahoma is apportioned are "prospectively null and void and inoperative for all future elections." The forthcoming November 6, 1962 election is not a "future election" within the meaning of said Interlocutory Decree, but is an election under way and in being at the time said order was entered, the same having started with the filing period in February, 1962, and having continued through primary and runoff elections with the said general election remaining to be held to complete the election process. See: *Gragg* v. *Dudley*, 289 P. 254. Moreover, by reapportionment being necessarily prospective in nature and being accomplished for future effect, said interlocutory decree applies to the elections of 1964 and future elections, including any election that may follow the 1962 election which is now in progress and has been since February, 1962.

With reference to a consideration of the remedies available to effect future reapportionment and the selection of a constitutionally acceptable remedy, the Court is of the opinion and decides that it defer action to the general session of the Oklahoma Legislature to be held in 1963, with a date to be fixed for final action in the matter by such Legislature and with positive guidelines or standards now being furnished said Legislature in the matter of discharging its responsibility to reapportion both houses of said Legislature for the 1964 and ensuing elections.

The following guidelines or standards are established:

1.

The Oklahoma Legislature will be reapportioned on the general principle of substantial numerical equality, to the end that each voter shall have approximately the same power and influence in the election of members of the two houses, which is in consonance with the intent and spirit of the Oklahoma Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

2.

The House of Representatives of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating to such House, except the Court finds and declares that the seven member ceiling established in Section 10(d), Article 5, Oklahoma Constitution for populous Counties results in invidious discrimination against the Plaintiff and his class, therefore violates the Fourteenth Amendment of the United States Constitution, and must be disregarded.

3.

The said seven member ceiling being eliminated, Oklahoma and Tulsa Counties are entitled to 19 and 15 legislative seats, respectively, under proper reapportionment, under the 1960 Federal Census.

4.

The Senate of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating thereto. In this connection, however, the Court is brought face to face with an irreconcilable incongruity in Section 9(a) of Article 5, of the Oklahoma Constitution, with respect to the formula for apportioning the Senate. This incongruity is caused by the "except" clause in Section 9(a), which creates a discrepancy between the total number of Districts and the total number of Senators. We resolve this incongruity in favor of equality of representation, which is mentioned three times in Sections 9(a) and 9(b), believing as we do that it is in consonance with the general principle of the Oklahoma Constitution, as construed by the Oklahoma Supreme Court in *Jones* v. *Freeman*, 146 P.2d 564, and more nearly conforms to the equal protection clause of the Fourteenth Amendment to the United States Constitution. Applying this general principle of equality, the Oklahoma Senate will thus consist of 44 Districts and 44 Senators. Under the 1960 Federal Census, Oklahoma County is entitled to eight Senatorial Districts and Senators; Tulsa County, seven Senatorial Districts and Senators; and, Comanche County, two Senatorial Districts and Senators. Those Counties having multiple Senatorial Districts will be districted within themselves into the requisite number of Districts by legislative act, provided each such District shall contain as near as may be an equal number of inhabitants; shall be contiguous and compact as practicable.

5.

The matter of forming legislative Districts, either House or Senate, among Counties is left to the discretion of the Legislature, under the pertinent provisions of the Constitution with respect to substantial numerical equality, compactness and contiguity. In this connection, the Memo-

randum and Suggested Order and Decree, filed in this Court on July 30, 1962, by the Honorable Fred Hansen, First Assistant and Acting Attorney General, is recommended as a most helpful treatise, and contains a Suggested Order And Decree which indicates a legislative apportionment for both houses, which has been studied by the Court, and which is believed to meet the desired standards.

Five months hence, when the Legislature convenes, it must reapportion itself in accordance with the constitutional mandate, or be judicially reapportioned. We have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity.

Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and this case dismissed. Failing this accomplishment, this Court will then order and decree reapportionment by judicial order, in conformity with the guidance herein furnished.

Dated this 3rd day of August, 1962.

/s/ Alfred P. Murrah
Alfred P. Murrah, Chief Judge
United States Court of Appeals
Tenth Circuit

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX VI.

DISSENTING OPINION OF JUDGE RIZLEY

Endorsed: Filed Aug. 8, 1962
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

One June 19, 1962 this Court filed a unanimous opinion in the above styled cause in which it said and I quote:

"The case now comes on for trial on its merits, the parties appearing in person or by counsel. From the stipulations, evidence and other facts of judicial notice, we find there has been only token reapportionment by the State of Oklahoma of its legislative body since 1911. Both branches of the legislature have consistently disregarded the provisions of the State Constitution with respect to reapportionment, with no thought of affording the equal protection of the laws."

We then reviewed all the attempts that had been made to obtain reapportionment in Oklahoma for the past fifty years including the attempt by initiative petition and then said: "On this record, the Court concludes that the existing apportionment of the offices of both houses of the Oklahoma Legislature is *grossly and egregiously* disproportionate, and without rational basis or justification in law or fact. We conclude that the apportionment of the Legislature of Oklahoma, under and by virtue of its apportionment statutes is *invidiously discriminatory* against this Plaintiff and his class of voters, and all such statutes are, therefore, *unconstitutional and void.*" (Italics ours).

We further said in our June opinion: "The Plaintiff and his class are entitled to appropriate equitable relief, which will substantially insure the numerical apportionment of the Oklahoma Legislature, in a manner to accord

the Plaintiff and his class the equal protection of the laws, guaranteed by the Fourteenth Amendment."

It should be noted that the Court, after reviewing the history of the Oklahoma Legislature for half a century, was not content with simply using the word "disproportionate," but emphasized that term by using the words "grossly and egregiously disproportionate." Webster's Dictionary defines the word "egregiously" as something that is prominent, eminent, conspicuous for bad quality, flagrant; and the word "invidious" as "tending to excite odium, ill will, or envy; likely to give offense; and unjustly discriminating." Mr. Webster says it is synonymous with "repugnant" and then he defines "repugnant" as "opposed or reciprocally opposed, contradictory, irreconciliable, as a principle repugnant to constitutional law; that offers resistance, hostile, refractory, distasteful, repellent." "Repugnant implies a nature alien to one's ideas, principles, or tastes, and a stirring up of resistance or loathing; repellant, a forbidding or unlovely quality that causes one to back away; abhorrent, a repugnance that stimulates antagonism."

In keeping with our June opinion, we filed with it a decree in which we said and I quote: "The Court is of the opinion that the existing statutes of the State of Oklahoma, relating to apportionment for the nomination and election of the members of both houses of the Oklahoma Legislature are invidiously diseriminatory against the Plaintiff and his class; hence, null and void.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O.S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections."

The majority seem to take comfort in the words "prospectively inoperative" and construe future elections not to mean the November election in 1962. They say further that by us refusing in our first opinion to enjoin the primary election, that we condoned the illegal and unconstitutional statutes, and they say that because the primary and general election is in fact all the same election, that we are obliged to recognize it as a legal election, notwithstanding that we have said the statutes under which it is being held are null and void.

In my search of judicial decisions since the beginning, I am unable to find any decision of any court which says that by condoning a void and illegal statute or by condoning a wrong, you breathe legality into the statute and give a right to those who operate under it, even though it is wrong.

In an endeavor to overturn the earlier opinion of this Court, entered herein on June 19th, the majority gives two legal reasons unsupported by authority. They say: (1) that the general election to be held in November, 1962 is not a future election; (2) that when we said in June that the statutes under which the legislature is apportioned are unconstitutional and void, they were just void in June and not in August and that we could control the operation of the Constitution.

The only authority cited by the majority in its decree in support of their finding that the general election in November, 1962 is not a future election is *Gragg* v. *Dudley*, 289 Pac. 254. This case itself is not in point since the interpretation therein that the election process includes registration, primary elections, the general election and the announcement of the election returns is pure dicta insofar as it related to the primaries. There a State Senator sought to run for the office of Lt. Governor. The question was raised that this violated Article 5, Section 23 of the Okla-

homa Constitution. All that was necessary to that decision was the ruling that the November election was not complete until the votes were counted and the result made known.

Article 3, Section 1 of the Oklahoma Constitution provides:

> "Qualified electors of this State shall be citizens * * * who have resided * * * in the election precinct thirty days next preceding the election to which such elector offers to vote."

Under Oklahoma law, a registration period is provided before the primary election, the run-off election, and still another before the general election. If the theory adopted by the majority is correct, the last two named registrations would violate this constitutional provision.

As a practical matter the Oklahoma Supreme Court in the case of *Stafford* v. *State Election Board*, 218 Pac. (2d) 617, did distinguish the cited case and said at page 620 the following:

> "We agree with the contention of petitioner that the provision of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election means at the date of the general election and not the primary election.
>
> "The Constitution does not prescribe the qualifications of a candidate in a primary election."

In *State* v. *Carter*, 59 Pac. (2d) 948, at 949, the Oklahoma Supreme Court said:

> "At the time of the adoption of the Constitution great consideration was given to the question of popular election of public officials. The Constitution required the Legislature to pass a mandatory primary law. Section 5, Article 3, Const. However, it has been

well recognized not only in this State, but by the highest courts of other states, that there is a wide distinction between 'election' and a primary election; the latter being statutory methods provided for the selection of representatives of the various political parties in the 'elections' provided by the Constitution for the selection of the various state, county and other public officers."

We submit that it is perfectly obvious that what the majority meant in June and what they now mean are entirely two different things.

The majority in its haste to recede from our June 19th opinion has glossed over a very important question of law. That is to say, where a court, as we did in the June opinion, declares a statute creating public offices null and void, the statute is null and void ab initio. This principle of law is set out at length in the landmark case of *Norton* v. *Shelby County,* 118 U.S. 425. The Supreme Court of Tennessee had earlier declared a statute allowing a board of commissioners to subscribe to railroad stock unconstitutional. The case was appealed to the United States Supreme Court. One of the parties argued that if there was not a de jure officer, that the officers were de facto. The other party argued that if the statute was unconstitutional, there was no office existing and there could not be a de facto officer. Mr. Justice Field, in answering the question posed, said:

> "But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county."

Said Mr. Field:

> "This contention is met by the fact that there can be no officer, either de jure or de facto, if there is no

office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. * * * Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Our own Oklahoma Supreme Court followed the United States Supreme Court in the case of *State* v. *The Board of County Commissioners of Creek County*, 188 Okla. 184, 107 P.2d 542, which says and I quote:

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. It imposes no duties, confers no rights, bestows no power or authority on any one, affords no protection and justifies no acts performed under it."

As I have heretofore suggested, the majority of the Court seems to take comfort in the words "prospectively null and void for all future elections," but the Oklahoma case above cited knocks this argument into a cocked hat by saying courts do not have the power to make a statute inoperative from the point of adjudication forward. Quoting from an earlier Florida case, our Court said, at page 574:

"Validity or invalidity relates to the enactment of a statute under existing organic law and not to a subsequent date. The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution."

We are bound to give weight and validity to the Oklahoma authorities, and when the Oklahoma Court has said that courts have no power to say when a statute is or is not inoperative, after once declaring the statute void as being unconstitutional, it would certainly be presumptious on our part to attempt to control the operation of the Constitution. Far be it from me to say that in a proper case that there is no quesion but what there is a place for the de facto doctrine, but ours is not such. This doctrine is founded upon consideration of policy and necessity for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the titles of persons clothed with authority. For the good order and peace of society, their authority is to be respected until some mode is prescribed by law to detemine their rights to serve. Such is not the case here. The offices of the legislature were determined null and void. They no longer exist, and the decree of June 19th contemplated a sure and orderly correction of the situation. The majority has backed away from the strength of the earlier decree and is now taking a position where they sanction that which they condemned. It is an untenable position, and in my opinion it is the unqualified duty of the Court to apportion.

There is positively no evidence in the record to sustain any finding that there is not ample time to have a primary,

a run-off, and a general election to elect a constitutional legislature. In fact all of the evidence is to the contrary.

There is also evidence in the records that funds can be made available to hold the elections. This would be legal, right and not postpone the relief to which we say the plaintiff and all of his class are entitled. "Justice delayed is justice denied."

Finally the majority, in order to extricate themselves from the June opinion, state they have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity. I have searched the record and do not find such a promise on the part of any individual legislator. To the contrary, nowhere does the record disclose that any single legislator, much less a majority of both Houses, have represented that the legislature intends to act in keeping with either the State Constitution or this Court's decree. The majority of the State Senate who intervened at the hearing on the remedy, state in their pleadings that they desire a legislative session "in order that they may *institute constitutional processes to correct the presently existing discriminatory constitutional provisions*"; furher, that "any relief, which the Court might decree, based on census population as aforesaid, would be invidiously arbitrary and discriminatory"; and finally, these intervening defendants contend and attempt to show that the provisions of the Constitution of Oklahoma, in respect to legislative representation in this State, have become invidiously discriminatory since the adoption of said provisions; "and that said provisions cannot be met or enforced by any legislation conforming thereto without contravention of Amendment XIV to the Constitution of the United States."

These intervenors even question the power of the judiciary to enforce the Fourteenth Amendment and state

that any decree herein would be an unlawful derogation of their powers. This was their pleading.

At the hearing they substantiated their intent by introducing a plethora of unexplained and useless figures and charts which they orally stated substantiated their contention that we should ignore the census and that they can ignore substantial equality in apportioning or in submitting constitutional revisions pertaining to apportionment.

Intervenors produced only two witnesses. The Speaker of the House of Representatives, who expressed a hope that the House could reapportion but refused to hazard an opinion as to the ability of the Senate to pass apportionment provisions, and I might say parenthetically, it is obvious that if there is only hope that the House might be able to pass such provisions, there can be no hope that the Senate can do so since it is far more malapportioned than the House. The other witness was a State Senator of many years' service, who would make no stronger statement than he was ready to assume his responsibilities to the people of the State. On cross-examination he admitted that he had always been ready to assume such responsibility, although he further admitted that he had voted against apportionment in accordance with the State Constitution during the previous session. He had served in each of the nine sessions since the State Supreme Court in *Jones* v. *Freeman* stated that the question of apportionment went to the "very vitals of democracy," and the Court in the *Jones* case had further solemnly placed its faith in the State Legislature to uphold its constitutional oaths. This witness stated he would not comply with the order of this Court but only act after the law is clearly outlined by the United States Supreme Court in subsequent opinions, which may take the Lord only knows how long to convince this Senator and others like him.

It is, therefore, respectfully submitted that my brothers' statement is wholly without basis in the record, and the facts of history for almost half a century disclose that it is wholly without justification and can only lead to a hopelessly chaotic legislative session that can produce nothing more than the submission of a constitutional amendment which, if adopted, would violate the Fourteenth Amendment. Even the Supreme Court of the State of Oklahoma in its most recent opinion, *Brown* v. *State Election Board, et al.*, stated:

> "An individual legislator may be willing to vote himself out of an office, but it would be difficult to find one who is willing to vote his constituents out of a legislator contrary to their wishes."

It is respectfully submitted that we should have deferred to the interpretation of the abilities of the legislators to reapportion themselves as expressed by the State Supreme Court and the Chief Executive of the State, who are in a far better position to judge the situation than are we. It is significant that the legislators solemn word is the only reason given by the majority for staying the judicial hand, and this reason is patently unsound.

We have found a legal wrong to exist. The majority would refer this wronged plaintiff and those of his class to a political remedy. In fact, the political remedy suggested is the very one which has caused the wrong. Therefore, I see no justification for delaying the judicial hand and to the contrary I foresee only chaos as a result of this delay and further complications as a result thereof. This Court has been fortunate in having a Chief Executive, a State Treasurer, an acting Attorney General and a State Election Board that have offered full cooperation. Who can dare say that their successors, who will be in office on March 8, 1963, will be as cooperative, much less cooperative at all?

While I might bleed with the majority for the downtrodden intervenors, who pleaded with the Court for a chance to do it themselves, I can only interpret what they may have in their minds by their past acts in challenging not only the Supreme Court of Oklahoma, but also more than 200,000 residents of Oklahoma who signed an Initiative Petition, the State Election Board, and everyone else who has attempted to get them to discharge their constitutional duty with honor and fidelity.

I respectfully dissent.

/s/ Ross Rizley
Ross Rizley, Judge
United States District Court
For the Western District of
Oklahoma.

APPENDIX VII.

Article V, Sections 9, 9a, 9b and 10, Constitution of Oklahoma (Volume 1, pp. 64-65, Oklahoma Statutes 1961).

§ 9. Membership and term of office

The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose term of office shall be four years: Provided, That one senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular state election in Nineteen Hundred and Eight, and one elected from each odd numbered district at said first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Ten: And Provided further, That in districts electing two senators, the two elected at the first election shall cast lots in such manner as the Legislature may prescribe to determine which shall hold the long and which the short term.

§ 9(a). Senatorial districts—Additional senators

At the time each senatorial apportionment is made after the year Nineten Hundred and Ten the State shall be divided into forty-four districts to be called senatorial districts, each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent. Said districts shall be numbered from One to Forty-four inclusive, and each of said districts shall contain as near as may be an equal number of inhabitants, such population to be ascertained by the next preceding Federal census, or in such manner as the Legislature may direct, and shall be in as compact form as practicable and

shall remain unaltered until the next decennial period, and shall at all times consist of contiguous territory.

§ 9(b). Division of counties, towns and wards—Equality of population

No county shall ever be divided in the formation of a Senatorial district except to make two or more senatorial districts wholly in such county. No town, and no ward in a city, when constituting only one voting precinct, shall be divided in the formation of a senatorial district, nor shall any senatorial district contain a greater excess in population over an adjoining district in the same county than the population of a town, or ward in a city, constituting only one voting precinct therein, adjoining such district. Towns, and wards in cities, constituting only one voting precinct, which may, from their location, be included in either of two senatorial districts, shall be so placed as to make such districts most nearly equal in number of inhabitants.

§ 10. Number and terms—Meeting of first legislature—Apportionment—Review of apportionment

The House of Representatives, until otherwise provided by law, shall consist of not more than one hundred and nine members who shall hold office for two years: Provided, That the representatives elected at the first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Eight: And Provided, That the day on which state elections shall be held shall be fixed by the Legislature.

(a) The first Legislature shall meet at the seat of government upon proclamation of the Governor on the day named in said proclamation, which shall not be more than thirty days nor less than fifteen days after the admission of the State into the Union.

(b) The apportionment of this State for members of the Legislature shall be made at the first session of the Legislature after each decennial Federal census.

(c) The whole population of the State as ascertained by the Federal census, or in such manner as the Legislature may direct, shall be divided by the number one hundred and the quotient shall be the ratio of representation in the House of Representatives for the next ten years succeeding such apportionment.

(d) Every county having a population equal to one-half of said ratio shall be entitled to one representative; every county containing said ratio and three-fourths over shall be entitled to two representatives, and so on, requiring after the first two an entire ratio for each additional representative: Provided, That no county shall ever take part in the election of more than seven representatives.

(e) When any county shall have a fraction above the ratio so large that being multiplied by five the result will be equal to one or more ratios, additional representatives shall be apportioned for such ratio among the several sessions of the decennial period. If there are two ratios, representatives shall be allotted to the fourth and third sessions, respectively; if three, the third, second, and first sessions, respectively; if four, to the fourth, third, second, and first sessions, respectively.

(f) Any county forming with another county or counties a representative district during one decennial period, if it has acquired sufficient population, at a fixed decennial period, shall be entitled to an additional representative, if there shall be left in the district from which it shall have been separated a population sufficient for a representative. No such change shall be made except at the regular decennial period for the apportionment of representatives.

(g) If in fixing any decennial ratio, a county previously a separate representative district shall have less than

he number required by the ratio for a representative, such county shall be attached to a county adjoining it and become part of such representative district.

(h) No county shall ever be divided in the formation of representative districts except to make two or more representative districts in such county. No town, or ward in a city, where it constitutes only one voting precinct, shall be divided in the formation of representative districts, nor shall any representative district contain a greater excess in population over an adjoining district in the same county than the population of a town or ward in a city, constituting only one voting precinct adjoining such district. Counties, towns, or wards in cities, constituting only one voting precinct, which, from location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants.

(i) Ascertaining the ratio of representation according to the Federal census, or such other enumeration as the Legislature may provide, and attaching any county, previously having a separate representative but found to have less than the number required by the ratio, to an adjoining county; and determining the number of representatives each county or district shall be entitled to, and for what sessions of the Legislature within the next decennial period; and apportioning the Senators, shall be done by the Legislature and be presented to the Governor for his approval in the same manner as other bills which may be passed by the Legislature.

(j) An apportionment by the Legislature shall be subject to review by the Supreme Court at the suit of any citizen, under such rules and regulations as the Legislature may prescribe. And such court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promply for the dsposal of the same.

APPENDIX VIII.

(a) Article V, Section 11, Constitution of Oklahoma. (Volume I, pp. 65-66, Oklahoma Statutes 1961).

§ 11. Senatorial districts—Composition and number of senators

Until the apportionment is made by the Legislature after the next Federal decennial census, the State, except as otherwise provided, shall be divided into thirty-three senatorial districts, each of which shall be composed of the counties as named, shall be numbered and elect senators as follows, namely:

First, Beaver, Cimarron, Harper, and Texas, one senator; Second, Beckham, Dewey, Ellis, and Roger Mills, two senators; Third, Woods and Woodward, one senator; Fourth, Greer, one senator; Fifth, Jackson and Tillman, one senator; Sixth, Custer, Kiowa, and Washita, two senators; Seventh, Alfalfa and Major, one senator; Eighth, Garfield, one senator; Ninth, Osage, Grant, and Kay, two senators; Tenth, Noble and Pawnee, one senator; Eleventh, Creek and Payne, one senator; Twelfth, Logan, one senator; Thirteenth, Lincoln and Pottawatomie, two senators; Fourteenth, Canadian and Oklahoma, two senators; Fifteenth, Caddo and Grady, two senators; Sixteenth, Blaine and Kingfisher, one senator; Seventeenth, Comanche, Jefferson, and Stephens, two senators; Eighteenth, Carter, Love, and Murray, two senators; Nineteenth, Cleveland, Garvin, and McClain, two senators; Twentieth, Atoka, Byran, and Coal, two senators: Twenty-first, Latimer and Le Flore, one senator; Twenty-second, Hughes and Okfuskee, one senator; Twenty-third, Pontotoc and Seminole, one senator; Twenty-fourth, Choctaw, McCurtain, and Pushmataha, one senator; Twenty-fifth, Pittsburg, one senator; Twenty-sixth, Marshall and Johnson, one senator; Twenty-seventh, Haskell, McIntosh,

and Muskogee, two senators; Twenty-eighth, Adair and Sequoyah, one senator; Twenty-ninth, Mayes and Craig, one senator; Thirtieth, Ottawa, Delaware, and Cherokee, one senator; Thirty-first, Tulsa and Washington, one senator; Thirty-second, Okmulgee and Wagnor, one senator; Thirty-third, Nowata and Rogers, one senator.

(b) Title 14, Sections 9-72, incl., Oklahoma Statutes 1961. (Volume I, pp. 1042-1046, incl., Oklahoma Statutes 1961).

§ 9. Nominating districts—Nominations—Voting

The Second Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two nominating districts; Roger Mills, Ellis and Dewey Counties shall constitute one nominating district and shall nominate a candidate for the State Senate in the primary election of 1942, and each four years thereafter; Beckham County shall constitute a nominating district and shall nominate a candidate for the State Senate in said district at the primary election of 1944, and each four years thereafter; and the candidates so nominated in said districts shall be voted for at the general election following such nomination by all the qualified electors in said Second Senatorial District.

§ 10. Sixth district—Nominating districts

The Sixth Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two (2) nominating districts: Washita and Kiowa Counties shall constitute one (1) nominating district and shall nominate a candidate for the State Senate at the primary election of 1942, and each four (4) years thereafter; Custer County shall constitute a nominating district and shall nominate a candidate for the State Senate in said District at the primary election of 1944, and each four (4) years thereafter;

and the candidates so nominated in said Districts shall be voted for at the general election following such nomination by all of the qualified electors in said Senatorial District.

§ 11. Ninth and thirty-first districts

From and after the passage of this Act, the Ninth Senatorial District of the State of Oklahoma shall be comprised of the Counties of Grant and Kay; the Thirty-first Senatorial District shall be comprised of the County of Tulsa.

§ 12. Thirty-fourth district

There is hereby created a Senatorial District to be numbered and known as the Thirty-fourth Senatorial District which shall be comprised of the territory embraced within the Counties of Osage and Washington.

§ 13. Number of senators

Hereafter each of said Senatorial Districts shall be represented by one Senator.

§ 14. Election of senators

At the election held in 1920, and each four years thereafter, there shall be elected one Senator from Senatorial District Number Thirty-four; provided, the Senator representing the Ninth Senatorial District, who is a resident of the territory embraced within the Thirty-fourth Senatorial District, shall represent the Thirty-fourth Senatorial District in the State Senate until a successor shall be elected, as hereinabove provided. Provided further, that at the election held in 1922, and every four years thereafter, there shall be elected one Senator each from Senatorial Districts Number Nine and Number Thirty-one.

§ 21. Thirteenth district—Nominating districts

The Thirteenth Senatorial District shall be divided into two nominating districts, Lincoln County constituting one

nominating district, and Pottawatomie County shall constitute one nominating district; and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated to be voted for at the general election, by all the qualified electors of said district.

§ 22. Fifteenth District—Nominating districts

The Fifteenth Senatorial District shall be divided into two nominating districts; Grady County constituting one nominating district, and Caddo County shall constitute one nominating district, and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated, to be voted for at the general election by all qualified electors of said district.

§ 31. Nominating districts

The Fourteenth Senatorial district shall be divided into two nominating districts, Canadian County constituting one nominating district, and Oklahoma County constituting another nominating district; and the qualified electors of said respective nominating districts as herein created shall each nominate a candidate for State Senator in said district as provided by law; and the candidate so nominated to be voted for at the general election by all the qualified electors of the said fourteenth Senatorial district.

§ 32. Nominations—Primary elections—District election—Additional senator

From each of said nominating districts candidates for State Senator of the State of Oklahoma, shall be nominated by political parties, or by petitioners of the respective districts, in the manner provided by law, and such candidates shall be voted for in the primary election to be held as provided by law in each of the nominating districts, and after

being nominated as herein provided, and as provided by law, the qualified voters and electors of the Senatorial district at large shall vote on all nominations so made; and no electors at such election shall vote for more than one candidate from each district at said election, unless there shall be added additional and further senators to said district other than those now provided for, and if a further or additional senator shall be provided so as to make three in said Senatorial district, then one of said senators shall be nominated from Canadian County, and the remaining senator or senators shall be nominated from Oklahoma County, and all of the senators thus nominated shall be elected as provided by law.

§ 33. Time for nominations and elections—Intention of act—Number and residence

Canadian County in the nominating district in this act created, shall nominate in said nominating district, one State senator, to be elected in said district at the August primary as provided by law in the year 1918 and such senator so nominated at said primary shall be voted for at the November election in the year 1918, and each four years thereafter. The senator or senators provided by law in said district, other than the one provided for as to Canadian County, shall be nominated at the August primary 1920, and elected at the November election, 1920, and every four years thereafter.

It being the intention of the provisions of this act to give to Canadian County one nominating district for one State senator in said district, and Oklahoma County one nominating senatorial district for one State senator in said district, and Oklahoma County one nominating senatorial district for one or more senators as may be provided by law in said district, provided always, that said district shall be entitled by law to two senators or more, and it further being the intention of this act that one senator shall be a

resident of Canadian County and one senator shall be a resident of Oklahoma County, the county from which the nomination shall be respectively made.

§ 41. Nominating districts—Nominations—Election

The Seventeenth Senatorial District of the State of Oklahoma shall be divided into two nominating districts; Stephens County and Jefferson County constituting one nominating district, and Cotton County and Comanche County shall constitute one nominating district; and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated shall be voted for at the general election, by all the qualified electors of said district.

§ 42. Nominations—Primary and district elections

From each of said nominating districts, candidates for State Senator of the State of Oklahoma, shall be nominated by political parties, or by petitioners of the representative districts, in the manner provided by law, and such candidates shall be voted for in the primary election to be held as provided by law in each of the nominating districts, and after being nominated as herein provided, and as provided by law, the qualified voters and electors of the Senatorial district at large shall vote on all nominations so made; and no electors at such election shall vote for more than one candidate from each district at said election.

§ 43. Time for nominations and elections

Stephens County and Jefferson County, in the nominating district in this Act created, shall nominate in said nominating district one State Senator, to be elected in said district at the August primary as provided by law in the year 1926, and such Senator so nominated at said primary shall be voted for at the November election in the year 1926, and each four (4) years thereafter. The Senator pro-

vided by law in said district comprised of Cotton County and Comanche County shall be nominated at the August primary, 1928, and elected at the November election, 1928, and every four (4) years thereafter.

§ 45.1 Eighteenth and twenty-six districts—Counties constituting

From and after the effective date of this Act, the Eighteenth (18th) Senatorial District of the State of Oklahoma shall be comprised of Carter County; the Twenty-Sixth (26th) Senatorial District shall be comprised of the Counties of Love and Marshall.

§ 45.2 Thirty-sixth district created—Counties constituting

There is hereby created a Senatorial District to be numbered and known as the Thirty-Sixth (36) Senatorial District of the State of Oklahoma, which shall be comprised of the territory embraced within the Counties of Murray and Johnston.

§ 45.3 Each district represented by one senator

Hereafter each of said Senatorial Districts shall be represented by one (1) Senator.

§ 45.4 Time of election of senators

At the general election to be held in 1942, and each four (4) years thereafter, there shall be elected one (1) Senator from Senatorial District No. 36; that at the general election to be held in 1944, and each four (4) years thereafter, there shall be elected one (1) Senator from Senatorial District No. 18, and one (1) Senator from Senatorial District No. 26.

§ 51. Nominating districts—Nominations—Election

The Nineteenth Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two Nominating Districts; Cleveland and McClain Counties

shall constitute one Nominating District and shall nominate a candidate for the State Senate in the primary election of 1934, and each four years thereafter; Garvin County shall constitute a Nominating District and shall nominate a candidate for the State Senate in said District at the primary election of 1936, and each four years thereafter; and the candidates so nominated in the said districts shall be voted for at the general election following said nomination by all of the qualified electors in said Nineteenth Senatorial District.

§ 52. Twentieth and twenty-fourth districts

From and after the passage of this Act, the Twentieth Senatorial District of the State of Oklahoma shall be comprised of the counties of Bryan and Choctaw; the Twenty-fourth Senatorial District shall be comprised of the Counties of Pushmataha and McCurtain.

§ 53. Thirty-fifth district

There is hereby created a Senatorial District to be numbered and known as the Thirty-fifth Senatorial District, which shall be comprised of the territory embraced within the Counties of Coal and Atoka.

§ 54. Number of senators

Hereafter each of said Senatorial Districts shall be represented by one Senator.

§ 55. Election of senators

At the election held in 1938, and each four years thereafter, there shall be elected one Senator from Senatorial District Numbered Thirty-five; provided, the Senator representing the Twentieth Senatorial District, and whose office expires in 1938, shall represent the Thirty-fifth Senatorial District in the State Senate until a successor shall be elected as hereinabove set forth; provided, further, that the Senator now representing the Twentieth District, who was

elected at the election in 1936, and the Senator now representing the Twenty-fourth District, who is a resident of the territory embraced within said District, shall continue to represent said Senatorial Districts Numbered Twenty and Twenty-four, respectively, until 1940; provided, further, that at the election held in 1940, and every four years thereafter, there shall be elected one Senator from Senatorial Districts Number Twenty and Twenty-four.

§ 61. Nominating districts—Nominations—Election

The twenty-seventh senatorial district of the State of Oklahoma shall be divided into two nominating districts; Muskogee County constituting one nominating district and Haskell and McIntosh Counties shall constitute one nominating district, and the qualified electors of said nominating districts, herein created, shall each nominate a candidate for state senator in said district, as provided by law, and the candidate, so nominated, shall be voted for at the general election by all the qualified electors of said district.

§ 62. Nominations—Primary elections—District election

From each of said nominating districts, candidates for state senator of the State of Oklahoma shall be nominated by political parties or by petitioners of the representative district in the manner provided by law, and such candidates shall be voted for in the primary election to be held, as provided by law, in each nominating district, and after being nominated, as herein provided, and at provided by law, the qualified voters and electors and the senatorial district at large, shall vote on all nominations, so made, and no elector at such election shall vote for more than one candidate from each district at said election.

§ 63. Time for nominations and elections

Muskogee County, in the nominating district, in this Act created, shall nominate in said nominating district one state senator, to be nominated in said district at the August

primary, as provided by law, in the year 1926, and such senator, so nominated, at the said primary, shall be voted for at the November election in the year 1926 and each four years thereafter. The senator, provided by law in said district, comprised of Haskell and McIntosh Counties shall be nominated at the August primary, 1928, and elected at the November election in 1928 and every four years thereafter.

§ 71. Twenty-eighth district—Counties comprising

From and after the passage of this Act the Twenty-eighth Senatorial District of the State of Oklahoma shall be comprised of Adair, Cherokee and Sequoyah Counties.

§ 72. Thirtieth district—Counties comprising.

From and after the passage of this Act the Thirtieth Senatorial District of the State of Oklahoma shall be comprised of Ottawa and Delaware Counties.

APPENDIX IX.

Title 14, Sections 97-100; incl., Oklahoma Statutes 1961 (Volume I, pp. 1047-1051, incl., Oklahoma Statutes 1961).

§ 97. Decennial legislative period—Biennial legislative periods or sessions—Election of representatives

The ten-year period beginning the 16th day after the general election in November, 1962, and ending the 15th day after the general election in November, 1972, shall constitute a Decennial Legislative Period, unless otherwise provided by law. And the period is hereby divided into five legislative periods or sessions of two years each with the number of representatives assigned to each county for each of the legislative periods to be those shown in Section 3 of this Act.

Representatives assigned to each county for each of the five legislative periods shall be elected at the general election in the month of November next preceding the commencement of the respective legislative period.

Unless otherwise provided by law the representatives assigned to each county for each legislative period shall be nominated and elected at large by the electors of the respective counties.

§ 98. Legislative periods

Legislative periods provided for in Section 1 of this Act shall cover these periods:

(a) The first legislative period shall begin on the 16th day after the general election in November, 1962, and end with the 15th day after the general election in November, 1964.

(b) The second legislative period shall begin on the 16th day after the general election in November, 1964, and end with the 15th day after the general election in November, 1966.

(c) The third legislative period shall begin on the 16th day after the general election in November, 1966, and end with the 15th day after the general election in November, 1968.

(d) The fourth legislative period shall begin on the 16th day after the general election in November, 1968, and end with the 15th day after the general election in November, 1970.

(e) The fifth legislative period shall begin on the 16th day after the general election in November, 1970, and end with the 15th day after the general election in November, 1972.

§ 99. Representation of each county in each period

Until another apportionment of the House of Representatives shall be made in accordance with the terms of the Constitution and laws of Oklahoma, the House of Representatives shall be composed of the representation listed in the table below, and this representation shall be the legislative apportionment of the House of Representatives for each of the five periods, as established in Section 2 of this Act.

The legislative apportionment by legislative periods are hereby fixed as follows, subject, however, to such change as may be required by operation of Section 6 of this Act.

COUNTIES	FIRST PERIOD	SECOND PERIOD	THIRD PERIOD	FOURTH PERIOD	FIFTH PERIOD
Adair	1	1	1	1	1
Alfalfa	1	1	1	1	1
Atoka	1	1	1	1	1
Beaver	1	1	1	1	1
Beckham	1	1	1	1	1
Blaine	1	1	1	1	1
Bryan	2	2	2	2	2
Caddo	2	2	2	2	2
Canadian	2	2	2	2	2
Carter	2	2	2	2	2
Cherokee	1	1	1	1	1
Choctaw	1	1	1	1	1
Cimarron	1	1	1	1	1
Cleveland	3	3	3	3	3
Coal	1	1	1	1	1
Comanche	4	4	4	4	4
Cotton	1	1	1	1	1
Craig	1	1	1	1	1
Creek	2	2	2	2	2
Custer	1	1	1	1	1
Delaware	1	1	1	1	1

Dewey	1	1	1	1	1
Ellis	1	1	1	1	1
Garfield	3	3	3	3	3
Garvin	2	2	2	2	2
Grady	2	2	2	2	2
Grant	1	1	1	1	1
Greer	1	1	1	1	1
Harmon	1	1	1	1	1
Harper	1	1	1	1	1
Haskell	1	1	1	1	1
Hughes	1	1	1	1	1
Jackson	2	2	2	2	2
Jefferson	1	1	1	1	1
Johnston	1	1	1	1	1
Kay	3	3	3	3	3
Kingfisher	1	1	1	1	1
Kiowa	1	1	1	1	1
Latimer	1	1	1	1	1
Le Flore	2	2	2	2	2
Lincoln	1	1	1	1	1
Logan	1	1	1	1	1
Love	1	1	1	1	1
McClain	1	1	1	1	1
McCurtain	2	2	2	2	2
McIntosh	1	1	1	1	1
Major	1	1	1	1	1
Marshall	1	1	1	1	1
Mayes	1	1	1	1	1
Murray	1	1	1	1	1
Muskogee	3	3	3	3	3
Noble	1	1	1	1	1
Nowata	1	1	1	1	1
Okfuskee	1	1	1	1	1
Oklahoma	7	7	7	7	7
Okmulgee	2	2	2	2	2
Osage	2	2	2	2	2

Ottawa	2	2	2	2	2
Pawnee	1	1	1	1	1
Payne	2	2	2	2	2
Pittsburg	2	2	2	2	2
Pontotoc	2	2	2	2	2
Pottawatomie	2	2	2	2	2
Pushmataha	1	1	1	1	1
Roger Mills	1	1	1	1	1
Rogers	1	1	1	1	1
Seminole	2	2	2	2	2
Sequoyah	1	1	1	1	1
Stephens	2	2	2	2	2
Texas	1	1	1	1	1
Tillman	1	1	1	1	1
Tulsa	7	7	7	7	7
Wagoner	1	1	1	1	1
Washington	2	2	2	2	2
Washita	1	1	1	1	1
Woods	1	1	1	1	1
Woodward	1	1	1	1	1
Total	120	120	120	120	120

§ 100. Division of certain counties into legislative districts

(a) Oklahoma County shall be divided into seven (7) legislative districts as follows:

(1) Legislative District No. 1, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue and Reno Street and extending along the center line of Reno Street to the center line of High Avenue; thence south to the center line of Southeast 15th Street, Oklahoma City; thence west to the center line of Western Avenue; thence south along the center line of Western Avenue to the center line of Southwest 29th Street, Oklahoma City; thence west to the center line of Pennsylvania Avenue; thence south to the center line

of Grand Boulevard; thence west to the western boundary of Section 18, Township 11 North, Range 3 West; thence south of said boundary to the Cleveland County line; thence west to the intersection of the Oklahoma County County line; thence north along the western boundary of Oklahoma County to the northwest corner of Deer Creek Township; thence east along the northern boundary of Oklahoma County to the intersection thereof with the Edmond Township; thence south along the western boundary of Range 3 West to the corporate limits of Oklahoma City; thence south on the center line of May Avenue to the center line of Reno Street and point of beginning.

(2) Legislative District No. 2, Oklahoma County, shall contain the following described territory: Beginning at the intersection of High and Reno Streets in Oklahoma City and extending north on the center line of High Avenue, or western boundary line of Section 35, Township 12 North, Range 3 West, to the intersection of Northeast 10th Street; thence east on the center line of Northeast 10th Street and Alice Street to the corporate limits of Oklahoma City; thence east on the southern boundary line of Section 25, Township 12 North, Range 3 West, to the western boundary of Crutcho Township; thence east to the county line; thence south to the county line; thence west to the intersection of county line with the western boundary of Section 31, Township 11 North, Range 3 West; thence north along said line to the corporate limits of Oklahoma City or Grand Boulevard; thence east on center line of Grand Boulevard to Pennsylvania Avenue, Oklahoma City; thence north along center line of Pennsylvania Avenue to the center line of Southwest 29th Street; thence east to the center line of Western Avenue; thence north to the center line of Southwest 15th Street; thence east to the center line of High Avenue or point of beginning.

(3) Legislative District No. 3, Oklahoma County, shall contain the following described territory: Beginning at the

intersection of Pennsylvania Avenue and Northwest 36th Street, and extending east along the center line of Northwest 36th Street to the center line of Western Avenue; thence south along the center line of Western Avenue to the center line of Northwest 23rd Street; thence east along the center line of 23rd Street to the center line of Harvey Avenue; thence south along the center line of Harvey Avenue to the center line of Northwest 10th Street; thence west along the center line of Northwest 10th Street to the center line of Pennsylvania Avenue and thence north along said center line to Northwest 36th Street, or place of beginning.

(4) Legislative District No. 4, Oklahoma County, shall contain the following described territory: Beginning at the intersection of North Harvey Avenue and Northwest 23rd Street in Oklahoma City, and extending east along the center line of Northwest 23rd and Northeast 23rd Streets to Kelley Avenue; thence north along the center line on Kelley Avenue to its intersection with Northeast 50th Street; thence east along the center line of Northeast 50th Street to the western boundary of Crutcho Township; thence south along the western boundary of Crutcho Township to the center of Northeast 10th Street; thence west along the center line of Northeast 10th Street and Northwest 10th Street to the center line of North Harvey Avenue; thence north along the center line of North Harvey Avenue to the point of beginning.

(5) Legislative District No. 5, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue, and Northwest 10th Street, and extending east along the center line of Northwest 10th Street and Northeast 10th Street to the center line of Kelley Avenue; thence south along the center line of Kelley Avenue and High Street to the center line of Reno Avenue; thence west along the center line of Reno Avenue to the center line of May Avenue; thence north along the center

line of May Avenue, to the center line of Northwest 10th Street or place of beginning.

(6) Legislative District No. 6, Oklahoma County, shall contain the following described territory: Beginning at the intersection of Northwest 23rd Street and Western Avenue; thence east along the center line of Northwest 23rd Street and Northeast 23rd Street to Kelley Avenue; thence north along the center line of Kelley Avenue to the intersection of Northeast 50th Street; thence east along the center line of Northeast 50th Street to the western boundary of Crutcho Township; thence south along the western boundary of Crutcho Township to its intersection with Northeast 10th Street; thence east along the center line of Northeast 10th Street extended to the Pottawatomie County line; thence north along the eastern boundary to Elk, Dewey and Luther Townships to the Logan County line; thence west along said line and the north line of Luther, Deepfork and Lincoln Townships to the Edmond Township line; thence south along the western boundary of Lincoln and Hartzell Townships to the Oklahoma Township line; thence west along said Township line to the center of North Western Avenue; thence south along the center line of North Western Avenue to the intersection of same with Northwest 23rd Street or the point of beginning.

(7) Legislative District No. 7, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue and Northwest 10th Street and extending east along the center line of Northwest 10th Street to the center line of Pennsylvania Avenue; thence north along the center line of Pennsylvania Avenue to the center line of Northwest 36th Street; thence east along the center line of Northwest 36th Street to the center line of Western Avenue; thence north along the center line of North Western Avenue to the corporate limits of Oklahoma City; thence north along the western boundary of Sections 9 and 4, Township 12 North, Range 3 West to the Britton

Township line; thence east along the Britton Township line to the western boundary of Hartzell Township; thence north along the western boundary of Hartzell and Lincoln Township to the Logan County line; thence west six miles to the western boundary of Edmond Township; thence south along the western boundary of Edmond, Britton and Oklahoma Townships to the corporate limits of Oklahoma City; thence south to the center line of May Avenue, to the intersection of Northwest 10th Street or point of beginning.

(b) Garfield County shall be divided into three (3) legislative districts as follows:

(1) Legislative District No. 1 and Legislative District No. 2 shall consist of the City of Enid. Candidates in these districts shall be residents of such districts and shall be nominated in primary elections by the electors of these districts and elected in the general elections by the electors of these districts.

(2) Legislative District No. 3 shall consist of all of Garfield County not embraced in District No. 1 and District No. 2. Candidates in this district shall be residents of this district and shall be nominated and elected by the electors of the district.

(c) Creek County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the City of Sapulpa, the Town of Kiefer, and the following townships: Mannford, Hazlip, Sapulpa, Kellyville, and Mounds.

(2) Legislative District No. 2 shall include the cities of Drumright and Bristow and the following townships: Tiger, Olive, Shannon, Depew, Bristow, Sunnyslope, Lakeside, Newby, and Euchee.

Candidates in these districts shall be electors of such districts and shall be nominated in primary elections by

the electors of these districts and elected in the general elections by the electors of the county at large.

(d) Le Flore County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the following election precincts as now established or as may hereafter be changed or altered:

Cowlington Pct. No. 1, Tucker Pct. No. 2, Spiro Pct. No. 1, Spiro Pct. No. 2, Spiro Pct. No. 3, Braden Pct. No. 1, Skulleyville Pct. No. 2, Pocola Pct. No. 1, Arkoma Pct. No. 2, Bokoshe Pct. No. 1, Bokoshe Pct. No. 2, Bokoshe Pct. No. 3, Milton Pct., Cameron Pct. No. 1, Williams Pct. No. 2, Rock Island Pct. No. 3, Tahoma Pct. No. 4, Shady Point Pct. No. 1, Panama Pct. No. 2, Hill Pct. No. 1, Gilmore Pct. No. 2, Monroe Pct., Tarby Pct. No. 2, Fairview Pct. No. 3, Calhoun Pct. No. 1, Walls Pct. No. 2, Wister Pct. No. 1, Fanshawe Pct. No. 2, Kennedy Pct. No. 3.

(2) Legislative District No. 2 shall include the following election precincts as now established or as may hereafter be changed or altered:

Poteau City Ward No. 1, Poteau City Ward No. 2, Poteau City Ward No. 3, Poteau City Ward No. 4, Howe Pct. No. 1, Howe Pct. No. 2, Glendale, Howe Pct. No. 3, Oakridge Pct. No. 4, Heavener City Ward No. 1, Heavener City Ward No. 2, Heavener City Ward No. 3, Heavener City Ward No. 4, Summerfield Pct. No. 1, Le Flore Pct. No. 2, Heavener Twp. Pct. No. 2, Reichert Pct. No. 3, Norman Pct. No. 4, Independence Pct. No. 5, Conser Pct. No. 1, Hodgen Pct. No. 2, Hontubby Pct. No. 3, Stapp Pct. No. 4, Page Pct. No. 1, Haw Creek Pct. No. 2, Muse Pct. No. 1, Big Cedar Pct. No. 2, Octavia Pct. No. 1, Cusher Pct. No. 2, Burkhart Pct. No. 3, Talihina Pct. No. 1, Forest Grove Pct. No. 2, Whitesboro Pct. No. 3, Forrester Pct. No. 6, Forest Hill Pct. No. 7, Midway Pct. (Monroe Twp.).

(3) In order to file as a candidate in either district the candidate must have lived the six (6) months immediately preceding filing date in said district, and the candidates so filing shall be voted on in primary elections by the electors of their particular district, and shall be voted on in the general election by the electors of the county at large.

(c) Payne County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the following townships as in existence at the time of the effective date of this Act: Rose, Pawnee, Cimarron, Mound, Eagle, Union, Indian, Clayton, Henry, and Glencoe.

(2) Legislative District No. 2 shall include all of Payne County not embraced in Legislative District No. 1, as created by this Act.

(3) Candidates in these districts shall be electors of such districts and shall be nominated in the primary elections by the electors of the respective district and elected in the general elections by the electors in the respective lgislative district.

(f) Seminole County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall be composed of the following townships: Red Mound, Brown, Miller, Lincoln, and Konawa.

(2) Legislative District No. 2 shall be composed of the following townships: Econtuchka and Wolf.

(3) Candidates in these districts shall be electors of such districts and shall be nominated in the primary elections by the electors of the respective district and elected in the general elections by the electors in the respective legislative district.

APPENDIX X

(a) Article V, Sections 1-4, incl., Constitution of Oklahoma (Volume I, pp. 62-63, Oklahoma Statutes 1961).

§ 1. Legislature—Authority and composition—Powers reserved to people

The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

§ 2. Designation and definition of reserved powers—Determination of percentages

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

§ 3. Petitions—Veto power—Elections—Time of taking effect—Style of bills—Duty of legislature

Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to the people of the State shall be had at the next election held throughout the State, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the initiative shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

The style of all bills shall be: "Be it Enacted By the People of the State of Oklahoma."

Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State and addressed to the Governor of the State, who shall submit the same to the people. The Legislature shall make suitable provisions for carrying into effect the provisions of this article.

§ 4. Referendum against part of act

The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislature in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of such act from becoming operative.

(b) Article XXIV, Sections 1 and 3, Constitution of Oklahoma (Volume I, p. 137, Oklahoma Statutes 1961).

§ 1. Amendments proposed by Legislature—Submission to vote

Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, at the next regular general election, except when the Legislature, by a two-thirds vote of each house, shall order a special election for that purpose. If a majority of all the electors voting at such election shall vote in favor of any amendment thereto, it shall thereby become a part of this Constitution.

If two or more amendments are proposed they shall be submitted in such manner that electors may vote for or against them separately.

No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition. As amended State Question No. 353, Referendum Petition No. 100. Adopted primary election July 1, 1952.

§ 3. Right of amendment by initiative petition not impaired

This article shall not impair the right of the people to amend this Constitution by a vote upon an initiative petition therefor.

Office-Supreme Court, U.S.
FILED
DEC 21 1962
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 689

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants
VERSUS
HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT OF OKLAHOMA FARM BUREAU AND LEWIS H. MUNN, APPELLANTS

FRANK CARTER of
OTJEN, CARTER, HUDDLESTON & OTJEN,
Bass Building,
Enid, Oklahoma,

Attorney for Oklahoma Farm Bureau, and Lewis H. Munn, Appellants.

December, 1962.

UTTERBACK TYPESETTING CO., 13 So. Walker, Oklahoma City, Ph. CE 5-8750

SUBJECT INDEX

	PAGE
Statement	1
Opinions Below	2
Grounds for Appellate Jurisdiction	2
Questions Presented	5
Statement of the Case	6
Reasons for Plenary Consideration	9
Conclusion	11

INDEX TO AUTHORITIES

CONSTITUTIONAL PROVISIONS:	
United States Constitution, Amendment XIV	7
Oklahoma Constitution, Art. V, Secs. 1, 2	8
FEDERAL STATUTES:	
34 Stat. 267-278	7
28 U.S.C., Sec. 2281	4
28 U.S.C., Sec. 1253	4
STATE STATUTES:	
14 O.S. 1961, Secs. 9-77	3
14 O.S. 1961, Secs. 99, 100	3
COURT DECISION:	
Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691	4, 10-11

INDEX CONTINUED

PAGE

Eicholt v. Public Service Commission, State of Missouri, 306 U.S. 268, 59 S. Ct. 532, 83 L. Ed. 641 ... 5

Florida Lime and Avacado Growers, Inc. v. Jacobson (Calif. 1960, 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568) ... 5

Oklahoma Gas and Electric Company v. Oklahoma Packing Company, 292 U.S. 386, 54 S. Ct. 732, 78 L. Ed. 1318 ... 5

Radio Corporation of America v. U. S. (D.C. Illinois 1950), 95 F. Supp. 660, 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062 ... 5

TEXTS:

Presidential Proclamation, Nov. 16, 1907 ... 8

INDEX TO APPENDIX

Appendix I:

Memorandum of Facts and Conclusion of Law on Motion for Interlocutory Relief ... i-xiv

Appendix II:

Dissenting Opinion of Judge Ross Rizley ... xiv-xxvi

Appendix III:

Interlocutory Decree ... xxvii-xxviii

Appendix IV:

Further Statement of Facts and Law on the Merits ... xxix-xl

Appendix V:

Decree ... xli-xliv

INDEX CONTINUED

	PAGE
Appendix VI:	
Dissenting Opinion of Judge Rizley	xlv-lv
Appendix VII:	
Article V, Sections 9, 9a, 9b and 10, Constitution of Oklahoma (Volume 1, pp. 64-65, Oklahoma Statutes 1961)	lvi-lix
Appendix VIII:	
(a) Article V, Section 11, Constitution of Oklahoma. (Volume I, pp. 65-66, Oklahoma Statutes 1961	lx-lxi
(b) Title 14, Sections 9-72, incl., Oklahoma Statutes 1961. (Volume I, pp. 1042-1046, incl., Oklahoma Statutes 1961)	lxi-lxix
Appendix IX:	
Title 14, Sections 97-100, incl., Oklahoma Statutes 1961. (Volume I, pp. 1047-1051, incl., Oklahoma Statutes 1961	lxix-lxxix
Appendix X:	
(a) Article V, Sections 1-4, incl., Constitution of Oklahoma (Volume I, pp. 62-63, Oklahoma Statutes 1961)	lxxx-lxxxi
(b) Article XXIV, Sections 1 and 3, Constitution of Oklahoma (Volume I, p. 137, Oklahoma Statutes 1961)	lxxxii
Appendix XI:	
Initiative Petition	lxxxiii-lxxxvi

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT OF OKLAHOMA FARM BUREAU AND LEWIS H. MUNN, APPELLANTS

This jurisdictional statement is filed by the appellants, Oklahoma Farm Bureau and Lewis H. Munn, concurrently

with the filing of a Record in this cause brought up by appeal, pursuant to Rule 13 and Rule 15 of this Court.

The appeal is taken from a Decree of a three-judge court convened in the United States District Court for the Western District of Oklahoma, which relates to reapportionment of the Legislative Branch of the Oklahoma State Government.

OPINIONS BELOW

APPENDIX No. I—Memorandum of Facts and Conclusion of Law and Interlocutory Decree on Motion for Interlocutory Relief. April 30, 1962.

APPENDIX No. II—Dissenting opinion of the Honorable Ross Rizley. April 30, 1962.

APPENDIX No. III—Interlocutory Decree of June 19, 1962.

APPENDIX No. IV—Further Statement of Facts and law on the merits relating to Interlocutory Decree of June 19, 1962.

APPENDIX No. V—Decree of July 31, 1962.

APPENDIX No. VI—Dissenting opinion of the Honorable Ross Rizley relating to Decree of July 31.

GROUNDS FOR APPELLATE JURISDICTION

This is a proceeding under which the complainant, a resident of Oklahoma City and on behalf of others similarly situated, seeks judicial reapportionment, and an injunction against certain State officers to restrain their performance of any official acts pursuant to current Legislative enact-

ment. Relying upon the Fourteenth Amendment to the Constitution, he attacks the validity of the reapportionment formula under which members of the Oklahoma Legislature are now elected. He alleges in substance that such apportionment is in violation of the Fourteenth Amendment to the Federal Constitution, that he is deprived of an equal vote for his representatives, and that he has no adequate remedy at law.

The applicable statutes and the provisions of the Oklahoma Constitution involved are as follows:

APPENDIX No. VII—Article V, Section 9, 9(a), 9(b) and 10, Oklahoma Constitution, Senatorial Districts.

APPENDIX No. VIII—Implementing Statutes—Senate, Title 14, O.S. 1961, Sections 9 to 72, inclusive.

APPENDIX No. IX—Implementing Statutes—Representatives, Title 14, O.S. 1961, Sections 97-100.

APPENDIX No. X—Article V, Sections 1 and 2, Oklahoma Constitution, Initiative and Referendum—Reservation of Power.

In this action, these appellants, Oklahoma Farm Bureau and Lewis H. Munn, were admitted as intervenors, and filed their Answer (R. 116, 127). On June 19, 1962, pursuant to hearing, the court by Interlocutory Decree held that the existing statutes of the State of Oklahoma relating to apportionment (Title 14, §§ 9-77, incl. and §§ 99 and 100m O.S., 1961) were invidiously discriminatory against the plaintiff and his class, and were null and void (App. III). The cause was continued until July 31, 1962, for the effectuation of appropriate relief and *final* judgment. On

July 31, 1962, the matter came further on for hearing and after said hearing, the court entered its decree which was filed August 3, 1962 (R. 141) (Appendix IV). From this Decree, your appellants duly filed Notice of Appeal in the United States District Court of the Western District of Oklahoma on August 29, 1962; and time within which to docket this appeal has been enlarged by various orders until and including December 21, 1962.

The effect of this Decree, as will become apparent, was the issuance of a mandatory injunction directing the Legislature *exclusively*, and ignoring the remedy of the people, under the Initiative, to reapportion, in violation of the Oklahoma Constitution, and in violation of the implementing statutes enacted.

It is therefore believed that pursuant to the proceeding held under Title 28, U.S.C., Sec. 2281, that Title 28, Sec. 1253; U.S.C., confers on this Court jurisdiction of the appeal:

> "Direct appeals from decisions of Three Judge Courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order, writing or denying after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a District Court of three Judges."

Representative cases believed to sustain the jurisdiction of this Court are:

—*Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691;

Oklahoma Gas and Electric Company v. *Okldhoma Packing Company*, 292 U.S. 386, 54 S. Ct. 732, 78 L. Ed. 1318;

Florida Lime and Avacado Growers, Inc. v. *Jacobson* (Calif. 1960, 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed.2d 568);

Radio Corporation of America v. *U. S.* (D.C. Illinois 1950), 95 F. Supp. 660, 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062.

Retention by the District Court of ministerial jurisdiction to enforce its Decree does not detract from the finality of this judgment nor deprive the Supreme Court of jurisdiction.

—*Eicholt* v. *Public Service Commission, State of Missouri*, 306 U.S. 268, 59 S. Ct. 532, 83 L. Ed. 641.

QUESTIONS PRESENTED

Assuming that:

(1) The State of Oklahoma has a republican form of government, and that

(2) Its Constitution provides for reservation of power in the people through the exercise of the Initiative and Referendum,

May the Federal Court:

(1) Arbitrarily substitute its judgment for that of the people, by

(a) Ignoring the remedy available to the plaintiff "and those similarly situated in con-

gested areas" by mandatory injunction to the Oklahoma Legislature, directing it to reapportion under threat of judicial reapportionment; and

(b) Directing the Legislature by mandatory injunction under threat of judicial reapportionment, and ignoring the remedy of the Constitutional Initiative, to reapportion *both* Houses of the Legislature on the basis of population; and

(c) Declaring that Section 10(d), Article V of the Oklahoma Constitution limiting House representation from any county to the number of seven (7) is void, and must be disregarded, even though representation in the Senate is based on population; and

(d) Restricting membership in the State Senate to forty-four (44) members, thereby ignoring the flexibility clause of the Oklahoma Constitution which would permit additional senators in more populated counties?

STATEMENT OF THE CASE

Mr. Moss of Oklahoma City in his Complaint, charges that the Government of Oklahoma is not republican in form, and that he and those similarly situated residing in the "congested areas" of Oklahoma, are deprived of equal protection of the laws, by reason of failure of the Legislature to apportion in accordance with the Constitution (R. 1).

Plaintiff does not complain of the constitutional formula. He merely complains that it has not been followed;

with the result that Oklahoma presently so he contends, does not have a republican form of government, and that he is denied the equal protection of the laws.

Section 3 of the Enabling Act passed by Congress June 6, 1906, 34 Stat. 267-268, authorized the adoption of a Constitution by the citizens of the Territory of Oklahoma, and the Indian Territory, and to become the State of Oklahoma.

Said Act further provided:

> "The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and s' all not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Pursuant to that Enabling Act, a Constitutional Convention was called in Oklahoma, and on November 21, 1906, the first act of the convention was to adopt the Constitution of the United States (which included of course, the Fourteenth Amendment) and to accept the Enabling Act.

By the Enabling Act, the President was authorized to determine whether or not the Oklahoma Constitution was in compliance with the Federal Constitution, and the requirements of such Act; and if so, to issue a proclamation approving such Constitution and admitting the State of Oklahoma into the Union.

The Constitution provided for by the Enabling Act was written at the Oklahoma Constitutional Convention; it was submitted to a vote of the p ple of Oklahoma, and by them adopted. It was also submitted to the President

of the United States, The Honorable Theodore Roosevelt, and he, in turn, found that it did comply with the requirements of the Enabling Act; and as a part of his proclamation issued November 16, 1907, stated:

> "And, whereas, it appears that the said Constitution and government of the proposed State of Oklahoma are *republican in form*, and that said Constitution makes no distinction in civil or political rights on account of race or color, and is not repugnant to the Constitution of the United States, or to the principles of the Declaration of Independence, and that it contains all of the six provisions expressly required by Section 3 of said Act [the Enabling Act] to be therein contained: * * *."

One of the provisions of the Constitution was embraced in Article V, Sections 1 and 2, O.S. 961 (Appendix X), under which the people reserved the right to amend the Constitution by the Initiative.

At the time of the hearing on July 31, 1962, there had been filed with the Secretary of State, an Initiative Petition signed by more than 200,000 legal voters of the State of Oklahoma (more than required by law), seeking an amendment to the Constitution of the State of Oklahoma, under which a Commission was designated consisting of the Secretary of State, the Attorney-General, and the State Treasurer as Commissioners to make a reapportionment in accordance with the Constitutional formula (See Appendix XI).

Notwithstanding the pendency of this petition (which was later submitted to a vote of the people on November 6, and which received a favorable vote of 335,045 as opposed

to a negative vote of 273,287), the lower court in its order of July 31, 1962, directed and enjoined the State Legislature to reapportion upon an entirely different basis and formula.

The formula which the Court directs the Legislature to follow constitutes a radical departure from the Constitutional Formula of Oklahoma (as ratified by the recent Initiative Petition), in that

(1) it directs both Houses to be apportioned by the Legislature on the basis of population;

(2) it directs that the Constitutional limit of seven members of the House of Representatives from any one county to be ignored;

(3) it places an arbitrary limit of 44 members in the Senate, ignoring the flexibility clause of the Constitution.

REASONS FOR PLENARY CONSIDERATION

This case is of great moment and importance to the State of Oklahoma.

It involves the very serious and substantial question as to whether or not a Federal Court may intervene to allievate an alleged political injustice to a citizen who has available to him the remedy of the Initiative or Referendum guaranteed to him by the Constitution of that State.

The question becomes more significant when, from the pleadings it appears, that the plaintiff is representing himself "and all those similarly situated," and where he defines himself and those similarly situated as having representatives who have only 1/10th of the voting power of rural representatives. Conversely, this means that the plain-

tiff and those similarly situated represent and constitute ten times the voting population of the remaining inhabitants of the State.

Consequently, it is obvious that the remedy of the Initiative is not a remote or inadequate measure of relief which is available to them.

If the Constitutional Formula ought to be changed, they are in a position to change it by orderly process and by methods provided by the Oklahoma Constitution. They are not compelled to resort to the extraordinary remedy of seeking constitutional change by judicial fiat. Under such circumstances, we feel the Court should not permit itself, and, in fact, has no authority, or justification to permit itself, to be burdened with the task of amending the State Constitution.

The plaintiff and his associates represent a majority of the voters of the State of Oklahoma. If the Constitution requires amendment, they are in a position to accomplish it. They do not require the gratuitous assistance of the Federal Court.

As very cogently stated by Mr. Justice Clark in his concurring opinion in the case of *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691:

> "Although I find that Tennessee apportionment statute offends the equal protection clause, I would not consider intervention by this court into so delicate a field, if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls,' to correct the

existing 'invidious discrimination.' *Tennessee has no Initiative and Referendum.*"

For these among other reasons we believe the questions presented here are substantial, that they require plenary consideration, with briefs on the merits and oral argument for their resolution.

FRANK CARTER of
OTJEN, CARTER, HUDDLESTON & OTJEN,
Bass Building,
Enid, Oklahoma,

Attorney for Oklahoma Farm Bureau, and Lewis H. Munn, Appellants.

December, 1962.

APPENDIX

APPENDIX

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. Moss, Plaintiff, vs. WILLIAM A. BURKHART, State Treasurer; ANDY ANDERSON, State Auditor; and J. D. DUNN, LAWTON LEININGER and MIKE CONNERS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWETT, Vice-Chairman, and LOUIE E. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma, Defendants, and M. A. PRICE, JOHN M. RASBERRY, J. R. HUTCHENS and ROY GRIMES, Directors of Oklahomans For Local Government, an unincorporated association, Intervenors.	)	No. 9130

Sid White for the Plaintiff, Harry R. Moss.

Delmer Stagner for the Defendant, William A. Burkhart, State Treasurer.

Fred Hanson, First Assistant Attorney General, for the Defendants, Andy Anderson, State Auditor; and J. D. Dunn,

[APPENDIX]

Lawton Leininger and Mike Conners, composing the Oklahoma Tax Commission of the State of Oklahoma.

John Wagner and Robert Blackstock for the Defendants, Clee Fitzgerald, Chairman, Herbert F. Hewett, Vice-Chairman, and Louie R. Geiser, Secretary, Members of the State Election Board of the State of Oklahoma.

Norman Reynolds for the Defendant, J. Howard Edmondson, Governor of the State of Oklahoma.

Leon S. Hirsh for the Intervenors, M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes, Directors of Oklahomans For Local Government, an unincorporated association.

Jim A. Rinehart for the Intervenor, M. A. Price.

Before MURRAH, Circuit Judge, and RIZLEY and DAUGHERTY, District Judges.

MURRAH, Circuit Judge.

MEMORANDUM OF FACTS AND CONCLUSION OF LAW ON MOTION FOR INTERLOCUTORY RELIEF

Endorsed: Filed Apr. 30, 1962
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

The Pleadings

This class action is a sequel to *Radford* v. *Gary*, 145 F. Supp. 541, in which another named plaintiff assailed the Oklahoma Apportionment Statutes for the election of the members to the Oklahoma Legislature, as a deprivation of the equal protection of the laws, vouchsafed to him by the Fourteenth Amendment to the United States Constitution. Like the named plaintiff in the *Radford* case, the plaintiff here is a citizen and resident of Oklahoma, and a qualified voter of the most populous County in the State. As such representative citizen and voter, he alleges that because of the shifting population of the state of Oklahoma from the rural sections to the cities and urban areas and because of the failure and refusal of the Legislature to reapportion its members as required by Article 5, Section 10 of the Oklahoma Constitution, the legislative department has become so grossly malapportioned that the ballot or vote of the plaintiff and those similarly situated, for the elected members of the Legislature, amounts to less than one-tenth of the sufferage of other citizens residing in the rural or more sparsely settled communities; that the Legislature has

repeatedly refused to reapportion itself in compliance with the constitutional mandate; that Initiative Petitions have failed and the judicial department has confessed its impotence to require compliance, as a consequence of which the plaintiff and his class must suffer the deprivation of due process of law and equal protection of the laws, with reference to taxation and the appropriation of public funds, to the serious impairment of his franchise. The prayer is that this Court recognize and enforce his right to an equal voice in his government, as a civil right within the meaning of the Constitution and laws of the United States; and that the Court declare the legislative department of the State of Oklahoma so malapportioned as to deprive its citizens of a republican form of government, and to deprive the plaintiff, and those similarly situated, the equal protection of the laws; that having so declared, the Court proceed to enjoin the State Auditor, State Treasurer, and Members of the Oklahoma Tax Commission from taking any official actions on appropriations or enactment of those claiming to exercise legislative authority; and, that if the plaintiff be mistaken in the remedy sought, he be then granted such remedy as will relieve and cure the evils from which he continues to suffer.

The plaintiff subsequently moved to make the Members of the State Election Board additional parties defendant, and amend his complaint to reiterate the deprivation of his franchise by the diminution or destruction of his vote, by reason of the refusal of the Legislature to reapportion itself, as commanded by the Constitution. Plaintiff specifically alleged that the Supreme Court of the State of Oklahoma had, on the 13th day of February, 1962, granted a writ of mandamus, directing the Secretary of the State Election Board, or his successor, to receive filings for the office of State Representative pursuant to the existing election laws, and to comply with any ministerial or other functions re-

quired by such laws. (House Bill 1033 of the Twenty-eighth Legislature, 14 O.S.A. §§ 45.1 *et seq.*, 71 *et seq.*, 90-101.)

The plaintiff asserts federal court jurisdiction of the subject matter under 28 U.S.C., Sec. 1343(3); that a justiciable controversy is presented; and, that the plaintiff has standing to maintain the suit. By way of immediate relief, the plaintiff seeks an injunction against the members of the State Election Board, to prevent them from certifying the names of candidates for nomination in the forth-coming May 1, 1962 primary election for the House and Senate from the existing districts, or in the alternative, an order directing the defendant Board Members to certify the said candidates for election by the State at large.

After the case was submitted and set for final disposition on Monday, April 23, 1962, M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes, Directors of Oklahomans For Local Government, an unincorporated association, were permitted to intervene as necessary or proper parties to the suit. In their answer, it was alleged that the State Election Board had performed all ministerial and other functions required by it for the conduct of the forthcoming primary; that all further acts in relation to the pending primary election must be done and performed by the several County Election Boards of the State; and, that such Boards are, therefore, indispensable parties to the relief sought and the suit must, therefore, be dismissed. Further answering, the Intervenors deny the justiciability of the relief sought, as political in nature. They specifically deny that the present apportionment of the Oklahoma Legislature operates to deny the plaintiff and his class the equal protection of the laws, but if so, allege that ample provision is made by the Constitution and laws of the State of Oklahoma for constitutional reapportionment; that within the past two years, the people of the State had, at freely held elections, expressly rejected suggested revisions

of their apportionment laws; and, that at the last session of the Legislature, the House of Representatives, by legislative action, did reapportion itself and that such action was approved by the Governor of the State. It is further alleged that a reapportionment, as provided by the Oklahoma Constitution and effected by virtue of shifting and changing population of the State since the adoption of the Constitution, would result in an invidious discrimination against many citizens of the State, and deprive them of the equal protection of the laws. Finally, it is alleged that reapportionment under the Constitution of Oklahoma is vested exclusively in the Legislature; that the Governor of the State is vested solely with the power of convocation; and, that the Legislature is wholly impotent to reapportion, redistrict or reallocate its representation until January, 1963, unless the Governor is required by this Court to call the Legislature into extraordinary session.

Jurisdiction

Federal Court jurisdiction rests upon claimed redress for the deprivation, under color of State law, of a right or privilege secured by the equal protection clause of the United States Constitution. See 28 U.S.C., Sec. 1343. This Court is constituted and convened under 28 U.S.C., Sec. 2284, pursuant to 28 U.S.C., Sec. 2281, to hear and determine the suit, based upon the allegation of the unconstitutionality of the Oklahoma apportionment statutes and the prayer for interlocutory and permanent injunction, restraining the enforcement or operation of such statutes.

When the matter came on for hearing on the plea for temporary relief, the Election Board appeared in person and by counsel, and joined in the statement by counsel for the plaintiff in support of the allegations in the Petition. The State Treasurer, William A. Burkhart, appeared by counsel and confessed the material allegations in the Peti-

tion. Upon oral motion of the plaintiff in open court, the Governor of the State of Oklahoma, Honorable J. Howard Edmondson, was made a party defendant. He thereupon entered his appearance by his attorney, Norman Reynolds, and consented to be sued as a defendant in this action. The Oklahoma Tax Commission and Andy Anderson, State Auditor, appeared by their counsel, Fred Hanson, Assistant Attorney General.

Statement of the Case

At the bar of the Court, the parties freely conceded, as did the parties in *Radford* v. *Gary, supra,* that the Oklahoma Legislature had, since 1910, failed and refused to reapportion the State in compliance with the mandate of the Oklahoma Constitution. Our attention was called to the Reapportionment Act of 1961 (House Bill 1033) by which the House of Representatives purported to reapportion itself, and that the Oklahoma Supreme Court had adjudged it in non-compliance with the constitutional requirements, on the same grounds for which the prior apportionment acts were held deficient; but, that the Oklahoma Supreme Court had refused to enjoin filings and elections under it on the ground that elections under the pre-existing law would result in far greater inequalities of representation than elections under the 1961 Act. See *Jones* v. *Winters*, 369 P.2d 135 (Dec. 19, 1961). And, had ordered the Secretary of the State Election Board to receive filings for office of State Representative under and pursuant to the 1961 Act. *Brown* v. *State Election Board*, 369 P.2d 140 (Feb. 13, 1962). It also appears that in 1961, the Oklahoma State Senate attempted to reapportion the entire State for senatorial purposes, but the Act was declared invalid, and the Oklahoma Supreme Court directed the State Election Board to receive filings for the office of the State Senate, pursuant to the apportionment laws in existence since 1941. *Reed* v.

State Election Board, 369 P.2d 156 (Feb. 13, 1962); see also Memorandum Decision in No. 39937, *Ludlow* v. *State Election Board* (Feb. 13, 1962).

Speaking through his attorney of record, the Governor of the State of Oklahoma, represented to the Court that he was elected Governor on a program to reapportion the Legislature; that he had recommended reapportionment in compliance with the constitutional mandate to each legislative session during his administration; that he sponsored an Initiative Petition, aimed at constitutional compliance, on which the requisite signatures were obtained, but which was defeated at the polls on September 20, 1960; that as a defendant in *Ludlow v. State Election Board, supra,* and as *amicus curiae* in the other recent actions, *i.e., Jones* v. *Winters, supra, Brown* v. *State Election Board, supra,* and *Reed* v. *State Election Board, supra,* he made suggestions concerning relief, which in his judgment were within the jurisdictional reach of the Oklahoma Supreme Court; that in his pleas to the Supreme Court, he had offered to convoke a special session of the Legislature, if that Court would assume jurisdiction and indicate its disposition to afford relief, in the event the Legislature failed to act.

The Governor also calls our attention to the pendency of another Initiative Petition to amend the Constitution, to transfer the enforcement of the constitutional apportionment formula from the Legislature to a Constitutional Apportionment Commission. We are told that the petition was filed in December 1961, bearing approximately 219,000 signatures; that a protest had been filed and is now pending before a Referee of the State Supreme Court; that in the last sixteen years, no Initiative Petition has received the required vote of the people and that, in any event, the pending petition cannot be voted upon in sufficient time to provide the basis for election of members to the Legislature for the 1963 session.

Based upon this experience, the Governor expressed the view that further attempts at reapportionment by legislative or intiative action would be vain and futile; that if the plaintiff and his class are to be afforded the equal protection of the laws, vouchsafed to them by the Constitution, they must find it here—that this Court is the only effective source of relief. Based upon this conviction, the Governor has willingly entered his appearance as a defendant in this case and now offers to convoke the Legislature in extraordinary session, under Article 6, Section 7 of the Oklahoma Constitution, for the specific purpose of enacting a system of election laws in consonance with constitutional requirements, or call a special election under Article 5, Section 20 of the Oklahoma Constitution and 26 O.S., Section 541, for the purpose of filling any vacancies resulting for failure of the forth-coming primary on May 1, 1962. It is suggested that the cost of any special election may be paid from appropriations from the Governor's contingency fund, and such funds are pledged for that purpose as the occasion arises.

The Election Board, responding through its attorney of record, represents that it is being required under mandamus of the Oklahoma Supreme Court to accept filings and conduct elections for the offices of both branches of the Legislature, in disobedience to the Constitution of the State of Oklahoma, and in violation of the equal protection clause of the Constitution of the United States—all in violation of their respective oaths of office. We are urged by the Election Board to grant the relief sought, as the only available and effective remedy.

The parties agree, as indeed they must, to the population of the State of Oklahoma, as evidenced by the 1960 Decennial Census, and to the distribution of the population by Counties, as shown by such census. They also agree to the representation of the Legislature by Counties and Districts,

and while the Intervenors do not seem to deny the allegations of the complaint to the effect that the apportionment of legislative representation to population results in a disparity of voting strength between the populous and sparsely populated voting districts, they specifically deny that such numerical inequality is invidiously discriminatory, and offer to prove that by reason of the peculiar economic and geographic characteristics of the presently constituted voting districts, the voting disparity is constitutionally justified, and rationally affords the citizens of the State of Oklahoma, including the plaintiff and his class, the equal protection of the laws.

Justiciability and Standing to Sue

A majority of the Court in *Radford* v. *Gary, supra*, denied relief in the face of a confessed deprivation of constitutional rights, under color of State law, because of the positive admonition to refuse to exercise our "equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *South* v. *Peters*, 339 U.S. 276, 277. Our decision was influenced by what seemed to be the prevailing view in *Colegrove* v. *Green*, 328 U.S. 549, and we were affirmed per curiam on authority of that case and *Kid* v. *McCandless*, 352 U.S. 902. Now, however, all such jurisdiction and justiciable doubts have been resolved by *Baker* v. *Carr*, — U.S. —, decided March 26, 1962. Jurisdiction of this Court to entertain the suit and to grant appropriate relief is no longer doubtful. Not only is our jurisdiction clear, but we are, indeed, importuned by all the parties, other than the Intervenors, in this suit to grant the long-sought and often denied relief, by some appropriate remedy.

The plaintiff and his class seek to protect or vindicate an interest of their own—"a plain, direct and adequate interest in maintaining the effectiveness of their vote," not

merely a citizen's interest in good government. See *Baker* v. *Carr*, Slip Op., p. 21. Having jurisdiction of a justiciable controversy, this Court is empowered to secure equitable or other relief for the denial of a constitutionally protected right.

The Case for Temporary Relief

As a prerequisite to any relief, it is, of course, incumbent upon the plaintiff to establish the unconstitutionality of the Oklahoma Apportionment Statutes, and plaintiff cannot sustain that burden by merely showing a disparity in the voting strength of the various electoral districts. Numerical inequality of voting strength does not necessarily prove a case for the deprivation of voting rights. An actionable deprivation results only from an invidious discrimination—a disparity without rationality. *McDougall* v. *Green*, 335 U.S. 281; *McGowan* v. *Maryland*, 366 U.S. 420; *Baker* v. *Carr, supra*. It seems fair to say, however, that a disparity of ten to one in the voting strength between electoral districts makes out a *prima facie* case for invidious discrimination, and calls for strict justification.

It must be conceded by all, that the present statutory apportionment does not comply with the Oklahoma Constitution. But, even so, a statutory apportionment which does comply with the State Constitution, does not, *ipso facto*, afford the equal protection of the laws, guaranteed under the Fourteenth Amendment. The test to be applied is found in the federal Constitution and, as we have seen, turns on the rationality of the apportionment.

No one has suggested that the challenged apportionment laws were conceived or enacted with the thought or purpose of affording substantial equality of voting rights, as between electoral districts. Until now, the Oklahoma Legislature has proceeded on the premise that the matter of allocating voting strength was strictly within their dis-

cretion, or even caprice. The Intervenors offer to show in retrospect a rational basis for the disparity, and they are, of course, entitled to their proof and they will be heard. Meanwhile, we can find no rational basis for saying that a vote in one electoral district which is worth ten times the vote in another electoral district for the same legislative body, affords the equal protection of the law to the disfavored voter. On the face of the present record, the apportionment for the State of Oklahoma appears to be closely akin to the "crazy quilt" apportionment in Tennessee.

This brings us to the matter of the appropriate relief to be afforded, pending the final determination of the case on its merits. A majority of the Court has reluctantly declined immediate interlocutory relief in the form of an injunction forbidding the forth-coming May 1, 1962 primary election, or alternatively, ordering the election to be conducted at large. Our reasons may be summarized as follows:

Because of the Intervenors' tendered issue of rationality, the drastic and unprecedented relief sought is deemed inappropriate. The effect of such an injunctive decree would be to disrupt a long established electoral system on unsettled facts.

Moreover, there is some question concerning the effectiveness of an injunctive decree, in view of the fact that candidates for the legislative offices have already been certified to the County Election Boards for the conduct of the election and the canvassing of the votes. Indeed, we are told that some of the candidates for the offices involved are unopposed, either in the forth-coming primary or the general election, and are, therefore, presently entitled to a certificate of election. In order to give uniformity of relief, it would thus be necessary to in some way void these certificates of election, and declare these offices vacant. The

result would likely be confusion and chaos, and provocative of interminable litigation.

Additionally, we have no assurance that the present Legislature, even if convened in extraordinary session, would enact a constitutionally acceptable system of apportionment and election laws for the nomination and election of its successors, prior to the 1963 session. In which event, under the provisions of the Constitution of the State of Oklahoma, the present members of the Legislature would continue to hold their offices until their successors were elected and qualified—presumably in 1965. See Article 23, Section 10, of the Oklahoma Constitution. It would be an awkward and clumsy thing for this Court to undertake to reapportion and redistrict the Legislature of the State of Oklahoma, in accordance with some judicially devised formula, and even more difficult to attempt to supervise speeal nominations and elections to the reapportioned Legislature. Certainly, we should undertake this essentially legislative function only as a last resort.

This does not mean, however, that the task is insurmountable or that we will not undertake it, if the circumstances ultimately compel it, nor does the denial of immediate relief herein mean that the present Legislature should not be afforded an opportunity to enact prospective reapportionment laws, in accordance with the supreme law of the land, as announced in *Baker* v. *Carr, supra*, and to which we all owe allegiance and are amenable. The Legislatures of other states have taken appropriate action to comply with the constitutional requirements, when faced with the inescapable duty of doing so. See *Asbury Park Press* v. *Woolley*, 161 A.2d 705; *Application of Lamb*, 169 A.2d 822; *MaGraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184; 177 F. Supp. 803. See also *Sims, et al.* v. *Frink, Secretary of State of Alabama, et al.* (April, 1962) (C.A. 5). Meanwhile, this case will proceed to issue and determination on its merits, with all deliberate speed.

APPENDIX II.

DISSENTING OPINION OF JUDGE ROSS RIZLEY*

Endorsed: Filed April 30, 1962
Vera L. Howard, Clerk
By Cecil A. Qualls, Deputy

I deeply regret that I am unable to agree with my distinguished colleagues and brethren, who constitute this three-judge court, to the effect that by delaying the relief prayed for by the plaintiff until at least 1965 complies with the intent or the spirit of the law announced in *Baker* v. *Carr*.

Actually this class action now before us for consideration is a sequel to *Radford* v. *Gary*, 145 F. Supp. 541, in which another named plaintiff assailed the Oklahoma Apportionment Statutes for the election of members to the Oklahoma State Legislature, as violative of the Oklahoma Constitution and a deprivation of the equal protection laws, vouchsafed to him by the Fourteenth Amendment to the United States Constitution. Like the named plaintiff in the *Radford* case, the plaintiff here is a citizen and resident of Oklahoma, and a qualified voter of the most populous county in the State. As such representative citizen and voter the plaintiff in the instant case claims that because of the shifting population of the State of Oklahoma from the rural sections to the cities and urban areas, and because of the failure and refusal of the Legislature to reapportion its members as required by Article 5, Section 10 of the Oklahoma Constitution, the legislative department has become so grossly malapportioned that the ballot or vote of the plaintiff and those similarly situated, for those elected members of the Legislature, amounts to less than one-tenth of the suffrage of other citizens residing in the rural or more sparsely settled communities. He says that the Oklahoma Legislature has repeatedly refused to reapportion itself in

compliance with the constitutional mandate, that Initiative Petitions have failed, and that the Judicial Department of Oklahoma has confessed its impotence to require compliance, as a consequence of which the plaintiff and his class must suffer the deprivation of due process of law and equal protection of the laws, with reference to taxation and the appropriation of public funds, to the serious impairment of his franchise; and that unless this Court recognizes and enforces his right to an equal voice in his government, as a civil right within the meaning of the Constitution and the laws of the United States, the Court will be depriving the plaintiff, and those similarly situated, of equal protection of the laws.

Subsequent to the filing of his original complaint, the plaintiff moved to make the Members of the State Election Board additional parties defendant and amended his complaint to reiterate the deprivation of his franchise by the diminution or destruction of his vote by reason of the failure of the Legislature to reapportion itself, as commanded by the Constitution. By way of immediate relief, he sought an injunction against the members of the State Election Board to prevent them from certifying the names of candidates for election to the House and Senate from the now existing districts, or ancillary to such relief, that the Court order said Board Members to certify the said candidates for election by the State at large.

At the trial of this case, upon oral motion of the plaintiff in open court, the Governor of the State of Oklahoma, The Honorable J. Howard Edmondson, was made a party defendant. He thereupon entered his appearance by his attorney, Norman Reyonlds, and consented to be sued as a defendant in the action.

Subsequently and after the Court had announced in open court that the case was submitted, the intervenors appeared and asked permission to intervene. They were given

permission to intervene with the explicit understanding that they must present themselves within the issues as they had been defined by the Court and only upon that condition.

At the bar of the Court the parties freely conceded, as did the parties in *Radford* v. *Gary*, that the Oklahoma Legislature had, since 1910, failed and refused to reapportion the State in compliance with the mandate of the Oklahoma Constitution. Likewise our attention was called to the Reapportionment Act of 1961 (House Bill 1033) by which the House of Representatives purported to reapportion itself, and that the Oklahoma Supreme Court had adjudged it in non-compliance with the constitutional requirements on the same grounds for which prior apportionment acts were held deficient; but, that the Oklahoma Supreme Court had failed to enjoin filings and elections under it on the grounds that elections under the pre-existing law would result in far greater inequalities of representation than elections under the 1961 Act. See *Jones* v. *Winters*, 369 P.2d 135. And, had mandamused the Election Board to receive filings for the office of State Representative under and pursuant to the 1961 Act, *Brown* v. *State Election Board*, 369 P.2d 140.

It also appears that in 1961 the Oklahoma State Senate attempted to reapportion the entire State for senatorial purposes, but the Act was declared invalid, and the Oklahoma Supreme Court directed the State Election Board to receive filings for the office of the State Senate, pursuant to the apportionment laws in existence since 1941. *Reed* v. *State Election Board*, 369 P.2d 156 (Feb. 13, 1962); see also Memorandum Decision in No. 39937, *Ludlow* v. *State Election Board* (Feb. 13, 1962).

Speaking through his attorney of record, the Governor of the State of Oklahoma, represented to the Court that he was elected Governor on a program to reapportion the

Legislature; that he had recommended reapportionment, in compliance with the constitutional mandate, to each legislative session during his administration; that he sponsored an Initiative Petition, aimed at constitutional compliance, on which the requisite signatures were obtained, but which was defeated at the polls on September 20, 1960. He further represented that, as defendant in *Ludlow* v. *State Election Board, supra*, and as *amicus curiae* in other recent actions, *Jones* v. *Winters, supra; Brown* v. *State Election Board, supra;* and *Reed* v. *State Election Board, supra*, he made suggestions concerning relief, which in his judgment were within the jurisdictional reach of the Oklahoma Supreme Court; that in his pleas to the Supreme Court, he had offered to convoke a special session of the Legislature, if the Supreme Court would assume jurisdiction and indicate its disposition to afford relief, in the event the Legislature failed to act.

The Governor also called the Court's attention to the pendency of another Initiative Petition to amend the Constitution, to transfer the enforcement of the constitutional apportionment formula from the Legislature to a Constitutional Apportionment Commission, and we were told that the petition was filed in December, 1961, bearing approximately 219,000 signatures, and that a protest has been filed and is now pending before a Referee of the State Supreme Court. The Governor's representative also stated that in the last sixteen years no Initiative Petition has received the required vote of the people and that, in any event, the pending petition could not be voted upon in sufficient time to provide the basis for election of members to the Legislature for the 1963 session.

Based upon this experience, the Governor expressed the view that future attempts at reapportionment by legislative or initiative action would be a vain and futile gesture; and that if the plaintiff and his class are to be afforded the

equal protection of the laws, vouchsafed to them by the Constitution, they must find it here—that this Court is the only effective source of relief. Based upon this conviction, the Governor willingly entered his appearance as a defendant in this case and offered to convoke the Legislature in extraordinary session, under Article 6, Section 5 of the Oklahoma Constitution, for the specific purpose of enacting a system of election laws in consonance with constitutional requirements, or call a special election under Article 5, Section 20 of the Oklahoma Constitution and 26 O.S. 61, Section 541, for the purpose of filling any vacancies which might result from failure of the forthcoming primary on May 1, 1962, as provided by present law. Through his spokesman, the Governor suggested that the cost of any special election could be paid for from appropriations from the Governor's contingency fund, and said funds are pledged for that purpose as the occasion arises.

The Election Board, responding through its attorney of record, represented that it is being required under mandamus of the Oklahoma Supreme Court to accept filings and conduct elections for the offices of both branches of the Legislature, in disobedience to the Constitution of the State of Oklahoma and in violation of the equal protection clause of the Constitution of the United States—all in violation of their respective oaths of office.

It seems to me perfectly clear, from all of this, that electorial representation in both branches of the Oklahoma Legislature, under the apportionment statutes now in existence, are invidiously discriminatory and operate to deprive the plaintiff and those of his class of the equal protection of the laws.

A majority of the special three-judge court, as now constituted, denied relief in *Radford* v. *Gary*, *supra*, in the face of a confessed deprivation of constitutional rights, under color of State law, because of what seemed to us a

positive admonition to refuse to exercise our "equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *South* v. *Peters*, 339 U.S. 276, 277. Our decision was influenced by what seemed to be the prevailing view in *Colegrove* v. *Green*, 328 U.S. 549, and we were affirmed per curiam on authority of that case and *Kid* v. *McCandless*, 352 U.S. 902. Now, however, all such jurisdiction and justiciable doubts have been resolved by *Baker* v. *Carr*, decided March 26, 1962. Jurisdiction of this Court to entertain the suit and to grant appropriate relief is no longer questioned. Not only is our jurisdiction clear, but we are, indeed, importuned by the plaintiff and the defendants to grant the long-sought and often denied relief by some appropriate remedy. Only the intervenors, which assume another name but are in fact members of the Oklahoma Legislature, are objecting.

As previously stated, the State Election Board, having been mandamused to proceed, has in fact gone ahead with election procedures and has accepted filings and certified those filings to the County Election Boards, where they will be placed on the County ballots and distributed to the precincts for the May 1 election. Also, in instances where legislative candidates were unopposed, certificates of nomination have been issued to such unopposed candidates in compliance with 26 O.S.A. 166. Having proceeded thus far under the order of the Supreme Court of Oklahoma, the Board was made a party defendant in this case in the Western District of Oklahoma, wherein the plaintiff has sought to enjoin the May 1 primary because his Federal Constitutional rights would be violated by the malapportionment which would be perpetuated by the primary election under existing apportionment laws.

As we understand the position of the Election Board in this case, although formally an adversary of the plaintiff,

the defendant Board is substantially sympathetic with the plaintiff's cause, and while it has not voluntarily urged the Court to restrain it from acting, it has clearly pointed out that for it to act on May 1 would be for it to further violate its oaths to uphold the Constitution of the United States and of the State of Oklahoma, and it believes and urges that existing apportionment laws are in violation of the 14th Amendment to the U. S. Constitution and thus clearly unconstitutional.

The majority says, that even though admittedly the present apportionment does not comply with the Oklahoma Constitution and constitutes invidious discrimination under Oklahoma Law, that we should not grant temporary relief because the plaintiff has not made a *prima facie* case of invidious discrimination so far as the Constitution of the United States is concerned. The issues as defined and confined admit that present apportionment laws show a disparity of ten to one in the voting strength between electoral districts. The Oklahoma Supreme Court has so found and held.

In my opinion it is stretching the point to absurdity for this Court to say that such disparity of voting strength and equality does not within itself make a case of invidious discrimination under the 14th Amendment of the Federal Constitution.

"Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State, according to the prescription of the organic law. To the extent that his county is given a lesser number of members in the lower House than are its due, his vote diminishes in value, and thus he does not receive the full measure of protection and representation which are of the essence of democracy. No man can boast of a higher privi-

lege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our Constitution that right is absolute. It is one of which he cannot be deprived either deliberately or by inaction on the part of a Legislature. Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." See *Asbury Park Press, Inc* v. *Wooley*, 161 A.2d 705, pp. 709-710.

Finally, the majority says that to enjoin the May 1 primary would likely cause confusion and chaos and be provocative of indeterminable litigation because, they say, some of the members of the Legislature have already been issued certificates of nomination and many others will be after the May primary. It is hard for me to follow the thinking of my brothers—that by condoning elections in unconstitutional districts, and thus encouraging more certificates of nomination and election, we are thus curtailing chaos and confusion and preventing provocative and indeterminable lawsuits. It could well be argued that under Oklahoma law an election certificate is conclusive. *State ex rel. Love* v. *Smith*, 142 Pac. 408.

Can an Election Be Enjoined?

Intervenors have cited an Oklahoma case (221 Pac. 779) to the effect that an election cannot be enjoined even if it is an illegal election. The Oklahoma Constitution provides in Article 3, Section 7 that no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage. However, I believe and so hold that legal

elections under constitutional laws shall not be enjoined but that the constitutional provision just mentioned would not inhibit the exercise of injunctive relief to halt an election under invalid and unconstitutional laws, which laws themselves strike at the very heart of the freedom and equality of suffrage prescribed by Article 3, Section 7 of the Oklahoma Constitution.

If the Election Board were enjoined from proceeding with the May 1 primary, it would be a simple enough matter for it to rescind and cancel the certifications of filings and of nominations heretofore issued. It could do this under its general power to act in the first place with regard to those certifications, and certainly it could do so if the Court, in its interlocutory decree, declared such certifications invalid.

After an Injunction, What?

What could be done if interlocutory relief is granted? I do not believe that the holding of at large elections is a practical interim answer, however, proper apportionment should and could be made and primary elections held in ample time for the general election in November, 1962. Certainly it is worthy of note here that a three-judge court in Alabama, while refusing to give interlocutory relief, had this to say, "The application is continued and re-set for hearing at ten o'clock on Monday, July 16. The hearing cannot be set for a much later date because, if this Court is to act effectively, some action must be taken in ample time before the general election of November, 1962."

I respectfully suggest that the majority in this case offers no relief other than a lecture to the members of the legislative body that they have a duty to act and ought to act, that they ought to do it in a special session, but, if not, in the next regular session to begin in 1963, and that

this Court will merely retain jurisdiction to see what the Legislature does.

Primary elections under existing apportionment laws should be enjoined. This Court should retain jurisdiction of the case and same should be continued to a day certain in mid or late summer. In its interlocutory decree, the Court should find that there has been at least a *prima facie* showing that existing apportionment laws are invalid and unconstitutional by both the State and Federal Constitutional yardsticks. The Court should strongly indicate that legislative reapportionment should be immediately forthcoming. The injunctive decree would serve as a sufficient stimulus for the calling of a special session of the Legislature by the Governor. In this connection, only the Governor can call a special session. The Legislature cannot convene itself. See Article 6, Section 7 of the Constitution of Oklahoma and the cases annotated thereunder.

If the Legislature met under such circumstances, it is highly probable, in view of an interlocutory decree, that the Legislature would reapportion itself and set new primary election dates and filing periods for the holding of valid and constitutional legislative elections in 1962. There is no question as to the Legislature's power to make the apportionment and prescribe the form, time and manner of primary and general elections. See Article 3, Sections 4, 4a, 5 and 6 of the Oklahoma Constitution. Certainly ample time remains for the Legislature to make the apportionment according to law and implement such so we could have primaries and a general election that would be legal as applied to the Legislature.

Should there be no special session, or should the Legislature fail to act, then the Court should proceed to hear the case on its merits. Assuming that the Court found that existing malapportionment violates the Fourteenth Amendment to the United States Constitution, the Court should

make the apportionment itself under its plenary equity powers and in the light of Article 5, Section 10(j) of the Oklahoma Constitution. I believe that the extraordinary powers to review are so broadly stated therein as to include the power to revise; else, the rights of citizens who are wronged would be without redress or remedy, and this section of the Constitution would be empty and vain.

The making of the apportionment by the Court will in no sense constitute an invasion of the province of the Legislature. It will not be judicial legislation, This is so because the apportionment would be made in order to achieve that substantial equality of representation which is spelled out as a formula in the Oklahoma Constitution. The Court would simply apply the formula to the Federal census figures of 1960. That application would be a mere ministerial act to be performed by the Court, or a special master. The Court has the power and could direct the defendant Board in this case to apply the formula and make the necessary districts for the House and Senate.

The sole question at issue is whether or not plaintiff's rights to substantial equality of representation, as expressed in the equal protection clause of the Constitution of the United States, will be violated if an election is held on May 1 under existing apportionment laws. All parties to this action have stipulated as to the essential facts.

Although intervenors proposed to introduce some evidence about the rationality of the existing apportionment, when given the opportunity to do so, they quickly reneged, pleading that they were not ready to introduce evidence, notwithstanding the fact that certain members of the Legislature were then in the courtroom and that intervenors had themselves filed their motion to intervene and proposed answer three days before the hearing.

The intolerable condition of malapportionment has existed for fifty years in Oklahoma. For twenty years the

Supreme Court of this State has said that existing apportionment does not comply with the Constitution and it has expressed hope that succeeding Legislatures would do something about it. Twenty years have passed and nothing has been done. On May 1 the people of Oklahoma will, in the absence of interlocutory relief, again nominate and later elect a Legislature which will be so badly misapportioned that the rights of all of the citizens of Oklahoma to the equal protection of the laws will be denied. That election should be enjoined. The Court now has the power to cure the cancer of malapportionment. To refuse to exercise this power and to hope that sometime in the future some malapportioned Legislature will cure itself of this disease is the same kind of fond hope expressed by the Supreme Court of Oklahoma twenty years ago.

There will be no special session of the Legislature if interlocutory relief is denied. The next regular session of the Legislature will be as malapportioned as its predecessors. That it will act in accordance with constitutional standards is entirely speculative.

Here and now the constitutional rights of citizens are being violated and will again be violated on May 1. This Court's duty is simply to declare that there is at least a grave question as to the constitutionality of existing apportionment under the Federal Constitution and to enjoin the May 1 primary. To temporarily halt an illegal and unconstitutional election is not to deny the rights of suffrage, but is to stimulate the proper constitutional agencies of government to do that which the Constitution declares should be done. If we are to continue to live under a constitutional government, the Constitution must be followed by every citizen and every agency of government. This Court's duty is to measure the actions of citizens and government alike by the Constitution and to enjoin without equivocation any purported action of citizens or govern-

ment which does not measure up to plain constitutional requirements.

The evil pointed up by this case is not new. Our would-be republican form of government has long been stigmatized by this same die-hard political parasite. The refusal of a Legislature, such as the one in view, to voluntarily comply with the clear mandates of the State Constitution, to which such body owes its existence, is inexcusable and demonstrates anarchic contempt for the ideal that this government continue as one of high-principled laws rather than degenerate into one of unprincipled men.

As a member of this court, I refuse to condone a Legislature which exists from districts declared by our own Supreme Court to be unconstitutional. I refuse to put the judicial stamp of approval on holding further unconstitutional elections for the members of the State Legislature.

I most respectfully dissent.

Ross Rizley
Ross Rizley, Judge
United States District Court
For the Western District of Oklahoma

APPENDIX III.

INTERLOCUTORY DECREE

Endorsed: Filed Jun. 19, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

Be it remembered, that this class action came on regularly for hearing June 12, 1962, pursuant to notice, on the petition of the Plaintiff and his class to annul the apportionment statutes of the State of Oklahoma, as violative of the equal protection clause of the Constitution of the United States, and a deprivation of his and their civil rights under 28 U.S.C. §1343. The parties appearing in person, or by counsel, as indicated in the former hearing. The Court having received evidence and having taken judicial notice of pertinent matters, and being fully advised in the premises, doth find and conclude:

1. That this specially constituted three-judge Court has jurisdiction of the subject matter and of the parties, with the power to hear and decide the controversy presented by the pleadings.

2. The Court is of the opinion that the existing statutes of the State of Oklahoma, relating to apportionment for the nomination and election of the members of both houses of the Oklahoma Legislature are invidiously discriminatory against the Plaintiff and his class; hence, null and void.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O.S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections.

IT IS FURTHER ORDERED that this cause be continued until July 31, 1962, for the effectuation of appropriate relief and final judgment.

/s/ Alfred P. Murrah
Circuit Judge

/s/ Ross Rizley
District Judge

/s/ Fred Daugherty
District Judge

APPENDIX IV.

Before MURRAH, Circuit Judge, and RIZLEY and DAUGHERTY, District Judges.

MURRAH, Circuit Judge.

FURTHER STATEMENT OF FACTS AND LAW ON THE MERITS

Endorsed: Filed Jun. 19, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

When this case came on for hearing on motion for temporary relief, we held the complaint sufficient to state a justiciable controversy, cognizable under 28 U.S.C. §1343, of which this three-judge Court has jurisdiction under 28 U.S.C. §2284, pursuant to 28 U.S.C. §2281. We expressed the view that a numerical disparity of as much as ten to one in legislative electoral districts, raised a serious question of malapportionment, which may very well constitute a prima facie case for invidious discrimination.

The Intervenors offered to show in retrospect a rational basis for the disparity, and we denied temporary injunctive relief and ordered the case to proceed to issue and trial on its merits "with all deliberate speed."

The case now comes on for trial on its merits, the parties appearing in person or by counsel, as in the former proceedings. From the stipulations, evidence, and other facts of judicial notice, we find that there has been only token reapportionment by the State of Oklahoma of its legislative body since 1911. Both branches of the Legislature have consistently disregarded the provisions of the State Constitution, with respect to reapportionment, with no thought of affording the equal protection of the laws. While there have been a number of attempts to reappor-

tion by Initiative Petition and Referendum, all such proposals have been defeated at the polls. There is now pending in the Supreme Court of Oklahoma, a further Initiative Petition, providing for constitutional reapportionment through the medium of a Reapportionment Commission. This petition has been vigorously opposed by the Intervenors in this case, and has been pending in the courts for more than five months.

The application of the 1960 Federal Census in Oklahoma to existing legislative apportionment, graphically demonstrates the present numerical disparity in the relative weight of the votes cast for respective members of the Legislature. By reference to this census, as applied to the present legislative apportionment, one vote for legislative Representative in Cimarron County is equal to fourteen votes for the same office in Oklahoma County, and eleven votes in Tulsa County. The numerical disparity existing in the Senatorial Districts is even greater. For instance, one vote in Senatorial District No. 26, comprising Love and Marshall Counties, equals 26.4 votes in District No. 31, comprising Tulsa County. The facts reveal that 61 members of the House of Representatives, constituting a majority, represent 26% of the total population of the State. The other 60 members of that House represent 74% of the population, or an average of 28,642 persons per Representative. Reduced to its simplest terms, this means that a majority of the Legislature is responsible to only 26% of the population and that the remaining Representatives represent 74% of the people.

Applying this analysis to the State Senate, it will be seen that nine Senators represent 52% of the people, or an average of 128,642 persons per Senator; the other 35 Senators represent about 48% of the population. In terms of voting strength, this means that a great majority of the Senators are answerable to slightly less than one-half

the people, and that nine of the 44 Senators represent 52% of the population.

Approaching these statistics from another point of view, all but 15 of the 77 districts are over-represented, when their actual population is compared to that which would be required to make up the State constitutional ratio, under the present census. Summarizing further, the facts reveal that there are discrepancies under present apportionment of as much as twenty-six to one, in the weight of an individual vote.

While mere numerical disparity in voting strength is not, per se, invidiously discriminatory, it is, to be sure, cogent evidence of it and, as we have seen, may be sufficiently disproportionate to constitute a prima facie showing. This is so, we think, because under our democratic institutions and republican form of government, the suffrage right of the individual is, and must be, the keystone—the common denominator, of self-government. Indeed, the framers of the Oklahoma Constitution recognized this inalienable principle by providing that population should be the primary basis for electoral diffusion. See: Article 5, Section 9 and 10, of the Constitution of the State of Oklahoma. Under the Oklahoma Constitution, the principle of numerical equality is the rule; and any deviation is the exception. *Jones* v. *Freeman*, 146 P.2d 564. We think this principle should also be our guideline in determining whether the equal protection of the laws has been honored in the State electoral processes. There may be relevant counter-vailing factors, such as geography, economics, mass media and functional or group voting strength. But none of these factors, whether considered separately or collectively, can overcome the basic principle underlying the right of an individual to cast an effective vote. See: Excerpts from testimony of Dr. Joseph Pray, attached hereto as Appendix.

Intervenors have specifically denied the irrationality of the existing numerical disparity and contend that apportionment in accordance with the mandate of the Oklahoma Constitution would operate to deprive them of the equal protection of the laws. They seem to say that any deviation from the present apportionment would be a deprivation of their rights. In sum, they claim a Federal constitutional right in the present apportionment.

Before this case came on for hearing, Intervenors moved for a continuance, and renewed the motion on the hearing date, in order to obtain sufficient time to correllate and evaluate what they considered competent data, justifying the existing apportionment. Particularly, they set forth eight (8) separately numbered categories of statistical data and information, allegedly requiring additional time for compilation. An examination of each of these categories reveals that all of the suggested data or information is, and has been, at all times readily available in the form of public records to the Intervenors or, for that matter, to any interested person. Moreover, it may be that the suggested factors are a product of, rather than a rational basis for, the existing discrimination. Surely, one may not acquire a constitutional right to a status, which is created by the persistent disregard of constitutional precepts. In short, the Intervenors may not pull themselves up by their own constitutional bootstraps. Additionally, it should be noted that more than fifty days have elapsed since the denial of temporary relief and the case was ordered to trial on its merits. Even so, we cannot believe that Intervenors have been prejudiced in any manner by the unavilability of any information which they say is pertinent. We are thus brought to the conclusion that if the Intervenors have a defense, based upon the rationality of the present apportionment, they have not diligently pursued it. The continuance was consequently denied.

On this record, the Court concludes that the existing apportionment of the offices of both houses of the Oklahoma Legislature is grossly and egregiously disproportionate, and without rational basis or justification in law or fact. We conclude that the apportionment of the Legislature of Oklahoma, under and by virtue of its apportionment statutes is invidiously discriminatory against this Plaintiff and his class of voters, and all such statutes are, therefore, unconstitutional and void.

The Plaintiff and his class are entitled to appropriate equitable relief, which will substantially insure the numerical reapportionment of the Oklahoma Legislature, in a manner to accord the Plaintiff and his class the equal protection of the laws, guaranteed by the Fourteenth Amendment. The Court has not heard evidence on the appropriateness of the relief, and the matter is set for further hearing on the 31st day of July, 1962, for the purpose of determining the form of relief to be granted. Meanwhile, it seems desirable to note some of the suggested remedies, to which the Plaintiff may be entitled:

1. Reapportionment by the Legislature itself. This, of course, is the most desirable and the most efficacious, for, as we have said, the constitutional duty rests first and foremost upon the legislative body, whose duty it is to observe and comply with the supreme law of the land, as it is judicially construed and applied.

2. Initiative and Referendum. We, of course, have in mind the pending Initiative Petition as a possible available remedy, but the right asserted here cannot be made to depend upon the will of the majority. It is founded in the Federal Statute, which gives redress for the deprivation of civil rights, including the integrity of the ballot.

3. Reapportionment by Judicial intervention, either by some judicially devised formula or election at large until constitutional apportionment is achieved by legislative ac-

tion. Neither of these alternatives are desirable, and will be resorted to only if the Legislature fails to constitutionally reapportion itself, so as to afford equal protection of the laws. In that connection, it should be noted that there is ample time for the Governor of this State to call the present Legislature into extraordinary session for the specific purpose of enacting a system of reapportionment laws, which will comply with the requirements of the equal protection of the laws. In this manner, the Legislators will be free to act, unencumbered and unentangled with the legislative problems which will confront the general session, convening early in 1963. If, therefore, the Legislature is in special session, or has been called before the date fixed herein for final judgment, the case will be continued until September 10, 1962 to await legislative action.

If and when, in the course of this litigation, it becomes necessary to bring about constitutional reapportionment by direct judicial action, it will be time enough to hear and consider any counter-vailing factors, which may enter into the equation of reapportionment, based essentially upon population. Until that day, the judicial hand is stayed.

[*Appendix to further Statement of Facts and Law on the Merits*]

Excerpts from the Testimony of Dr. Joseph Pray, at the Hearing held June 12, 1962

Q. (By MURRAH, C.J.) Doctor, may I ask you a question which, in my judgment, goes to the heart of this lawsuit. You understand that the plaintiffs in this case, who are qualified electors in a populous County in the State, are here complaining that the present apportionment laws of the State of Oklahoma operate to invidiously discriminate against them in the exercise of their voting rights. You also understand this Court is empowered to hear and determine that complaint, and what we are now seeking to determine

is whether or not the present apportionment laws of this State infringe the equal protection clause of the Fourteenth Amendment, in that it invidiously discriminates against these plaintiffs. You understand that?

A. (By Dr. Joseph Pray) I do, yes sir.

Q. The Supreme Court of the United States has said that the equal protection of the laws, guaranteed by the Fourteenth Amendment, does not assure a proper diffusion of political initiative as between its thinly populated Counties and those having concentrated populations. You understand that?

A. Yes sir, I understand diffusion.

Q. * * * (T)he Courts have said that the equal protection of the laws does not require a State to achieve numerical equality with exactitude. That is to say, there may be some disparity between one County and another, so long as it doesn't amount to invidious discrimination.

A. Yes sir.

Q. That is the key word, and if we analyze what invidious discrimination means, then we quite understand what the Courts are talking about. Now then, we have the proof here, and it stands undisputed, that there has been no reapportionment since statehood. Meanwhile, as you know, we have had a rather radical shift in population into the metropolitan centers of the State, and so we stand here on the facts, with a wide disparity of representation on a ratio which is shown here as much as one to 26. You understand that fact?

A. Yes, sir.

Q. Now then, on a population basis, and the facts before this Court demonstrate beyond any doubt, that there

is a wide disparity in population with respect to representation, in ratio, to representation in the legislative body. My question is, what other factors should the science of government take into consideration, and therefore, what other factors should this Court take into consideration in terms of equal protection of the laws, to assure a proper diffusion of political initiative? What factors, other than numerical representation, should we take into consideration? You could help this Court immeasurably, if you would enlighten us on that.

* * * * * * *

A. This is a fundamental question. * * * It goes very much to the heart of the whole issue, and I am thinking of Baker versus Carr and the majority and minority opinions, and the various views expressed there. * * * We are going to come back to this problem many, many times in the next five years, but I did refer to this, it seems to me, possibly anticipating this question, when I talked about the necessity to start at some place when it comes to the diffusion of political power. This is the key to politics. * * * To start at some place where the common denominator is the individual. We are talking about human society. The study of politics, particularly in recent years, has been very much interested in not who has suffrage, but who is influential in the legislative arena, the subject of pressure groups for instance, how influential they are, and how does a person go about getting enough campaign funds or how to run an effective campaign, it goes into the question of mass communication. It refers to whether the plaintiffs, being in an urban area, don't have counter-vailing facilities at their disposal. The metropolitan press has been a matter of great contention in a State like ours. It is hard to tell whether it helps you or hurts you. It has been a question of

whether this large group was more significant than this little person, who may or may not be their representative. Take the majority position in Baker versus Carr, in terms of when you should presumably strike down an apportionment scheme, if there is no rational basis.

Q. We are asked to strike down the present statutory apportionment on the ground it operates invidiously to discriminate against this particular plaintiff and those like him.

A. The operation of the scheme?

Q. Yes, the operation.

* * * * * * *

A. * * * The majority view stresses the suffrage phase of this question. This is a very important point to me, to the extent of what you had in Tennessee, and which is not different much from our situation, it seems to me.

A. * * * And to the extent you have one to 26, you have a diffusion of suffrage power which is as bad as if the vote was not counted because of fraud or some other reason it would also violate it, or if the discrimination on suffrage grounds was based on race, let us say, the white primary cases are especially, as long as you look at it in terms of whether or not this vote is being made effective, and you appreciate that our National constitution, for various reasons, calls for our votes being made effective. This sort of thing, and this sort of analogy, which, I think, is a very good analogy, when it takes into consideration there are people being affected because their votes—this sort of thing wouldn't condone much interference with the basis of numbers.

Q. Nor any room for tolerance?

A. Not any room for tolerance. * * * There is a rough and ready relationship here which some how is a necessity, if you think a person's vote should be counted. Now about these counter-vailing factors which come regularly. I think society will have to take care of those other ways but again when we divide the access to power by giving people the right to vote, the privilege of voting although some authority disregard it, you can bring these counter-vailing factors in. Some place you have to start in a Democracy with the general principle of numerical equality.

* * * * * * *

Q. * * * assuming one County traditionally casts * * * a much higher percentage of its qualified electors, and the populous County doesn't. Can we take that into consideration?

A. One doesn't exercise its right—

Q. Declining the constitutional right to do so if he chooses. Is that what you are talking about?

A. I will say you cannot take that into consideration. * * *

* * * * * * *

Q. May I ask you this question: As I understand the testimony today, as stated a moment ago, we have a wide disparity in America. That stands, either admitted or not. Do you think of any other factors by which this Court could justify it in terms of equal protection of the laws?

A. In other factors but numbers?

Q. Yes. Any other factors that would justify or by which this Court could say in the fact of this * * * obvious disparity, that it may be justified as affording the equal protection of the law?

A. I don't think so. I will make one little modification in a minute but the experience with functional representation where it has been tried in Europe as part of their legislative process. * * * This is a thing Germany tried for years * * * on the assumption (of) * * * working out a system of representation which is mostly more vital because some of the dynamic aspects of political decisions go off on organized efforts rather than the efforts of individuals; when you try functional representation. * * *

Q. Will you explain what you mean by functional?

A. The use of an economic council which would set up an individual body instead of individuals and based on the representation of the dynamic economical groups in the state and one of the legs this thing falls back on; to keep that representation, three per cent or whatever it is. Would it be three per cent ten years from now and so on? The political groupings of dynamic interest groups in our political life is a rapidly changing arrangement. They have come to the fore very significantly today and not so much tomorrow. * * * This is a prime example of using other groups rather than the individual, economic representation. It has bogged down because political decision has to be made somewhere. * * * You start with the individual and you try to adhere to him, as a basis rather than use a functional group. If you built in a favorable position for a favorable minority group, how would you get rid of it? How would the dynamics be developed if you would regroup it?

Q. Under our system of government the dignity of the individual is recognized and the individuals are here * * * asserting a personal right in that connection, and, of course, we are concerned not with classes so much as we are the dignity of the individual and his personal

right to vote and have his vote counted. That is our inquiry and that is our concern. Then as I understand your testimony, and I certainly don't wish to put any words in your mouth, as I understand your testimony, you say as a student of the science of government and as a student of our particular problem here, do you not think that economic or political factors that enter into the equation are such as would justify the numerical disparity?

A. Justify going against the numerical arrangement?

Q. Yes.

A. I don't. I do not think there should be any group.

Q. Do you know of any factors?

A. There is no question but what minority groups, and it might be an urban minority or a rural minority, the minority groups will struggle like everything to get more power, decision making or whatever their members call it. So there will always be this striving, that is assured, but this should not be the starting point. You should start with the individual and dignity of the individual and all of that.

Q. Something that approximates numerical equality.

A. Yes.

Q. Is that your starting point?

A. The starting point is there.

APPENDIX V.

DECREE

Endorsed: Filed Aug. 3, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

The above matter came on for hearing pursuant to assignment on the 31st day of July, 1962; on the Motion to Alter or Amend Decree, filed by the Intervenors M. A. Price, et al., Directors of Oklahomans For Local Government, an unincorporated associatic ., and for a consideration of the various remedies for reapportionment suitable for implementation in view of the previous Interlocutory Decree entered by this Court on June 19, 1962.

The said Motion to Alter or Amend Decree is overruled, except by way of clarification it is the order of the Court that the scheduled general election, to be held on November 6, 1962, is not affected by the order of this Court entered on June 19, 1962 to the effect that the laws under which the present legislature of Oklahoma is apportioned are "prospectively null and void and inoperative for all future elections." The forthcoming November 6, 1962 election is not a "future election" within the meaning of said Interlocutory Decree, but is an election under way and in being at the time said order was entered, the same having started with the filing period in February, 1962, and having continued through primary and runoff elections with the said general election remaining to be held to complete the election process. See: *Gragg* v. *Dudley*, 289 P. 254. Moreover, by reapportionment being necessarily prospective in nature and being accomplished for future effect, said interlocutory decree applies to the elections of 1964 and future elections, including any election that may follow the 1962 election which is now in progress and has been since February, 1962.

With reference to a consideration of the remedies available to effect future reapportionment and the selection of a constitutionally acceptable remedy, the Court is of the opinion and decides that it defer action to the general session of the Oklahoma Legislature to be held in 1963, with a date to be fixed for final action in the matter by such Legislature and with positive guidelines or standards now being furnished said Legislature in the matter of discharging its responsibility to reapportion both houses of said Legislature for the 1964 and ensuing elections.

The following guidelines or standards are established:

1.

The Oklahoma Legislature will be reapportioned on the general principle of substantial numerical equality, to the end that each voter shall have approximately the same power and influence in the election of members of the two houses, which is in consonance with the intent and spirit of the Oklahoma Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

2.

The House of Representatives of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating to such House, except the Court finds and declares that the seven member ceiling established in Section 10(d), Article 5, Oklahoma Constitution for populous Counties results in invidious discrimination against the Plaintiff and his class, therefore violates the Fourteenth Amendment of the United States Constitution, and must be disregarded.

3.

The said seven member ceiling being eliminated, Oklahoma and Tulsa Counties are entitled to 19 and 15 legislative seats, respectively, under proper reapportionment, under the 1960 Federal Census.

4.

The Senate of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating thereto. In this connection, however, the Court is brought face to face with an irreconcilable incongruity in Section 9(a) of Article 5, of the Oklahoma Constitution, with respect to the formula for apportioning the Senate. This incongruity is caused by the "except" clause in Section 9(a), which creates a discrepancy between the total number of Districts and the total number of Senators. We resolve this incongruity in favor of equality of representation, which is mentioned three times in Sections 9(a) and 9(b), believing as we do that it is in consonance with the general principle of the Oklahoma Constitution, as construed by the Oklahoma Supreme Court in *Jones* v. *Freeman*, 146 P.2d 564, and more nearly conforms to the equal protection clause of the Fourteenth Amendment to the United States Constitution. Applying this general principle of equality, the Oklahoma Senate will thus consist of 44 Districts and 44 Senators. Under the 1960 Federal Census, Oklahoma County is entitled to eight Senatorial Districts and Senators; Tulsa County, seven Senatorial Districts and Senators; and, Comanche County, two Senatorial Districts and Senators. Those Counties having multiple Senatorial Districts will be districted within themselves into the requisite number of Districts by legislative act, provided each such District shall contain as near as may be an equal number of inhabitants; shall be contiguous and compact as practicable.

5.

The matter of forming legislative Districts, either House or Senate, among Counties is left to the discretion of the Legislature, under the pertinent provisions of the Constitution with respect to substantial numerical equality, compactness and contiguity. In this connection, the Memo-

randum and Suggested Order and Decree, filed in this Court on July 30, 1962, by the Honorable Fred Hansen, First Assistant and Acting Attorney General, is recommended as a most helpful treatise, and contains a Suggested Order And Decree which indicates a legislative apportionment for both houses; which has been studied by the Court, and which is believed to meet the desired standards.

Five months hence, when the Legislature convenes, it must reapportion itself in accordance with the constitutional mandate, or be judicially reapportioned. We have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity.

Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and this case dismissed. Failing this accomplishment, this Court will then order and decree reapportionment by judicial order, in conformity with the guidance herein furnished.

Dated this 3rd day of August, 1962.

/s/ Alfred P. Murrah
Alfred P. Murrah, Chief Judge
United States Court of Appeals
Tenth Circuit

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX VI.

DISSENTING OPINION OF JUDGE RIZLEY

Endorsed: Filed Aug. 8, 1962
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

One June 19, 1962 this Court filed a unanimous opinion in the above styled cause in which it said and I quote:

"The case now comes on for trial on its merits, the parties appearing in person or by counsel. From the stipulations, evidence and other facts of judicial notice, we find there has been only token reapportionment by the State of Oklahoma of its legislative body since 1911. Both branches of the legislature have consistently disregarded the provisions of the State Constitution with respect to reapportionment, with no thought of affording the equal protection of the laws."

We then reviewed all the attempts that had been made to obtain reapportionment in Oklahoma for the past fifty years including the attempt by initiative petition and then said: "On this record, the Court concludes that the existing apportionment of the offices of both houses of the Oklahoma Legislature is *grossly and egregiously* disproportionate, and without rational basis or justification in law or fact. We conclude that the apportionment of the Legislature of Oklahoma, under and by virtue of its apportionment statutes is *invidiously discriminatory* against this Plaintiff and his class of voters, and all such statutes are, therefore, *unconstitutional and void.*" (Italics ours).

We further said in our June opinion: "The Plaintiff and his class are entitled to appropriate equitable relief, which will substantially insure the numerical apportionment of the Oklahoma Legislature, in a manner to accord

the Plaintiff and his class the equal protection of the laws, guaranteed by the Fourteenth Amendment."

It should be noted that the Court, after reviewing the history of the Oklahoma Legislature for half a century, was not content with simply using the word "disproportionate," but emphasized that term by using the words "grossly and egregiously disproportionate." Webster's Dictionary defines the word "egregiously" as something that is prominent, eminent, conspicuous for bad quality, flagrant; and the word "invidious" as "tending to excite odium, ill will, or envy; likely to give offense; and unjustly discriminating." Mr. Webster says it is synonymous with "repugnant" and then he defines "repugnant" as "opposed or reciprocally opposed, contradictory, irreconciliable, as a principle repugnant to constitutional law; that offers resistance, hostile, refractory, distasteful, repellent." "Repugnant implies a nature alien to one's ideas, principles, or tastes, and a stirring up of resistance or loathing; repellant, a forbidding or unlovely quality that causes one to back away; abhorrent, a repugnance that stimulates antagonism."

In keeping with our June opinion, we filed with it a decree in which we said and I quote: "The Court is of the opinion that the existing statutes of the State of Oklahoma, relating to apportionment for the nomination and election of the members of both houses of the Oklahoma Legislature are invidiously discriminatory against the Plaintiff and his class; hence, null and void.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O.S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections."

The majority seem to take comfort in the words "prospectively inoperative" and construe future elections not to mean the November election in 1962. They say further that by us refusing in our first opinion to enjoin the primary election, that we condoned the illegal and unconstitutional statutes, and they say that because the primary and general election is in fact all the same election, that we are obliged to recognize it as a legal election, notwithstanding that we have said the statutes under which it is being held are null and void.

In my search of judicial decisions since the beginning, I am unable to find any decision of any court which says that by condoning a void and illegal statute or by condoning a wrong, you breathe legality into the statute and give a right to those who operate under it, even though it is wrong.

In an endeavor to overturn the earlier opinion of this Court, entered herein on June 19th, the majority gives two legal reasons unsupported by authority. They say: (1) that the general election to be held in November, 1962 is not a future election; (2) that when we said in June that the statutes under which the legislature is apportioned are unconstitutional and void, they were just void in June and not in August and that we could control the operation of the Constitution.

The only authority cited by the majority in its decree in support of their finding that the general election in November, 1962 is not a future election is *Gragg* v. *Dudley*, 289 Pac. 254. This case itself is not in point since the interpretation therein that the election process includes registration, primary elections, the general election and the announcement of the election returns is pure dicta insofar as it related to the primaries. There a State Senator sought to run for the office of Lt. Governor. The question was raised that this violated Article 5, Section 23 of the Okla-

homa Constitution. All that was necessary to that decision was the ruling that the November election was not complete until the votes were counted and the result made known.

Article 3, Section 1 of the Oklahoma Constitution provides:

> "Qualified electors of this State shall be citizens * * * who have resided * * * in the election precinct thirty days next preceding the election to which such elector offers to vote."

Under Oklahoma law, a registration period is provided before the primary election, the run-off election, and still another before the general election. If the theory adopted by the majority is correct, the last two named registrations would violate this constitutional provision.

As a practical matter the Oklahoma Supreme Court in the case of *Stafford* v. *State Election Board*, 218 Pac. (2d) 617, did distinguish the cited case and said at page 620 the following:

> "We agree with the contention of petitioner that the provision of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election means at the date of the general election and not the primary election.
>
> "The Constitution does not prescribe the qualifications of a candidate in a primary election."

In *State* v. *Carter*, 59 Pac. (2d) 948, at 949, the Oklahoma Supreme Court said:

> "At the time of the adoption of the Constitution great consideration was given to the question of popular election of public officials. The Constitution required the Legislature to pass a mandatory primary law. Section 5, Article 3, Const. However, it has been

well recognized not only in this State, but by the highest courts of other states, that there is a wide distinction between 'election' and a primary election; the latter being statutory methods provided for the selection of representatives of the various political parties in the 'elections' provided by the Constitution for the selection of the various state, county and other public officers."

We submit that it is perfectly obvious that what the majority meant in June and what they now mean are entirely two different things.

The majority in its haste to recede from our June 19th opinion has glossed over a very important question of law. That is to say, where a court, as we did in the June opinion, declares a statute creating public offices null and void, the statute is null and void ab initio. This principle of law is set out at length in the landmark case of *Norton* v. *Shelby County*, 118 U.S. 425. The Supreme Court of Tennessee had earlier declared a statute allowing a board of commissioners to subscribe to railroad stock unconstitutional. The case was appealed to the United States Supreme Court. One of the parties argued that if there was not a de jure officer, that the officers were de facto. The other party argued that if the statute was unconstitutional, there was no office existing and there could not be a de facto officer. Mr. Justice Field, in answering the question posed, said:

> "But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county."

Said Mr. Field:

> "This contention is met by the fact that there can be no officer, either de jure or de facto, if there is no

> office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. * * * Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Our own Oklahoma Supreme Court followed the United States Supreme Court in the case of *State* v. *The Board of County Commissioners of Creek County*, 188 Okla. 184, 107 P.2d 542, which says and I quote:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. It imposes no duties, confers no rights, bestows no power or authority on any one, affords no protection and justifies no acts performed under it."

As I have heretofore suggested, the majority of the Court seems to take comfort in the words "prospectively null and void for all future elections," but the Oklahoma case above cited knocks this argument into a cocked hat by saying courts do not have the power to make a statute inoperative from the point of adjudication forward. Quoting from an earlier Florida case, our Court said, at page 574:

"Validity or invalidity relates to the enactment of a statute under existing organic law and not to a subsequent date. The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution."

We are bound to give weight and validity to the Oklahoma authorities, and when the Oklahoma Court has said that courts have no power to say when a statute is or is not inoperative, after once declaring the statute void as being unconstitutional, it would certainly be presumptious on our part to attempt to control the operation of the Constitution. Far be it from me to say that in a proper case that there is no quesion but what there is a place for the de facto doctrine, but ours is not such. This doctrine is founded upon consideration of policy and necessity for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the titles of persons clothed with authority. For the good order and peace of society, their authority is to be respected until some mode is prescribed by law to detemine their rights to serve. Such is not the case here. The offices of the legislature were determined null and void. They no longer exist, and the decree of June 19th contemplated a sure and orderly correction of the situation. The majority has backed away from the strength of the earlier decree and is now taking a position where they sanction that which they condemned. It is an untenable position, and in my opinion it is the unqualified duty of the Court to apportion.

There is positively no evidence in the record to sustain any finding that there is not ample time to have a primary,

a run-off, and a general election to elect a constitutional legislature. In fact all of the evidence is to the contrary.

There is also evidence in the records that funds can be made available to hold the elections. This would be legal, right and not postpone the relief to which we say the plaintiff and all of his class are entitled. "Justice delayed is justice denied."

Finally the majority, in order to extricate themselves from the June opinion, state they have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity. I have searched the record and do not find such a promise on the part of any individual legislator. To the contrary, nowhere does the record disclose that any single legislator, much less a majority of both Houses, have represented that the legislature intends to act in keeping with either the State Constitution or this Court's decree. The majority of the State Senate who intervened at the hearing on the remedy, state in their pleadings that they desire a legislative session "in order that they may *institute constitutional processes to correct the presently existing discriminatory constitutional provisions*"; furher, that "any relief, which the Court might decree, based on census population as aforesaid, would be invidiously arbitrary and discriminatory"; and finally, these intervening defendants contend and attempt to show that the provisions of the Constitution of Oklahoma, in respect to legislative representation in this State, have become invidiously discriminatory since the adoption of said provisions; "and that said provisions cannot be met or enforced by any legislation conforming thereto without contravention of Amendment XIV to the Constitution of the United States."

These intervenors even question the power of the judiciary to enforce the Fourteenth Amendment and state

that any decree herein would be an unlawful derogation of their powers. This was their pleading.

At the hearing they substantiated their intent by introducing a plethora of unexplained and useless figures and charts which they orally stated substantiated their contention that we should ignore the census and that they can ignore substantial equality in apportioning or in submitting constitutional revisions pertaining to apportionment.

Intervenors produced only two witnesses. The Speaker of the House of Representatives, who expressed a hope that the House could reapportion but refused to hazard an opinion as to the ability of the Senate to pass apportionment provisions, and I might say parenthetically, it is obvious that if there is only hope that the House might be able to pass such provisions, there can be no hope that the Senate can do so since it is far more malapportioned than the House. The other witness was a State Senator of many years' service, who would make no stronger statement than he was ready to assume his responsibilities to the people of the State. On cross-examination he admitted that he had always been ready to assume such responsibility, although he further admitted that he had voted against apportionment in accordance with the State Constitution during the previous session. He had served in each of the nine sessions since the State Supreme Court in *Jones* v. *Freeman* stated that the question of apportionment went to the "very vitals of democracy," and the Court in the *Jones* case had further solemnly placed its faith in the State Legislature to uphold its constitutional oaths. This witness stated he would not comply with the order of this Court but only act after the law is clearly outlined by the United States Supreme Court in subsequent opinions, which may take the Lord only knows how long to convince this Senator and others like him.

It is, therefore, respectfully submitted that my brothers' statement is wholly without basis in the record, and the facts of history for almost half a century disclose that it is wholly without justification and can only lead to a hopelessly chaotic legislative session that can produce nothing more than the submission of a constitutional amendment which, if adopted, would violate the Fourteenth Amendment. Even the Supreme Court of the State of Oklahoma in its most recent opinion, *Brown* v. *State Election Board, et al.*, stated:

> "An individual legislator may be willing to vote himself out of an office, but it would be difficult to find one who is willing to vote his constituents out of a legislator contrary to their wishes."

It is respectfully submitted that we should have deferred to the interpretation of the abilities of the legislators to reapportion themselves as expressed by the State Supreme Court and the Chief Executive of the State, who are in a far better position to judge the situation than are we. It is significant that the legislators solemn word is the only reason given by the majority for staying the judicial hand, and this reason is patently unsound.

We have found a legal wrong to exist. The majority would refer this wronged plaintiff and those of his class to a political remedy. In fact, the political remedy suggested is the very one which has caused the wrong. Therefore, I see no justification for delaying the judicial hand and to the contrary I foresee only chaos as a result of this delay and further complications as a result thereof. This Court has been fortunate in having a Chief Executive, a State Treasurer, an acting Attorney General and a State Election Board that have offered full cooperation. Who can dare say that their successors, who will be in office on March 8, 1963, will be as cooperative, much less cooperative at all?

While I might bleed with the majority for the downtrodden intervenors, who pleaded with the Court for a chance to do it themselves, I can only interpret what they may have in their minds by their past acts in challenging not only the Supreme Court of Oklahoma, but also more than 200,000 residents of Oklahoma who signed an Initiative Petition, the State Election Board, and everyone else who has attempted to get them to discharge their constitutional duty with honor and fidelity.

I respectfully dissent.

/s/ Ross Rizley
Ross Rizley, Judge
United States District Court
For the Western District of
Oklahoma.

APPENDIX VII.

Article V, Sections 9, 9a, 9b and 10, Constitution of Oklahoma (Volume 1, pp. 64-65, Oklahoma Statutes 1961).

§ 9. Membership and term of office

The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose term of office shall be four years: Provided, That one senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular state election in Nineteen Hundred and Eight, and one elected from each odd numbered district at said first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Ten: And Provided further, That in districts electing two senators, the two elected at the first election shall cast lots in such manner as the Legislature may prescribe to determine which shall hold the long and which the short term.

§ 9(a). Senatorial districts—Additional senators

At the time each senatorial apportionment is made after the year Nineten Hundred and Ten the State shall be divided into forty-four districts to be called senatorial districts, each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent. Said districts shall be numbered from One to Forty-four inclusive, and each of said districts shall contain as near as may be an equal number of inhabitants, such population to be ascertained by the next preceding Federal census, or in such manner as the Legislature may direct, and shall be in as compact form as practicable and

shall remain unaltered until the next decennial period, and shall at all times consist of contiguous territory.

§ 9(b). Division of counties, towns and wards—Equality of population

No county shall ever be divided in the formation of a Senatorial district except to make two or more senatorial districts wholly in such county. No town, and no ward in a city, when constituting only one voting precinct, shall be divided in the formation of a senatorial district, nor shall any senatorial district contain a greater excess in population over an adjoining district in the same county than the population of a town, or ward in a city, constituting only one voting precinct therein, adjoining such district. Towns, and wards in cities, constituting only one voting precinct, which may, from their location, be included in either of two senatorial districts, shall be so placed as to make such districts most nearly equal in number of inhabitants.

§ 10. Number and terms—Meeting of first legislature—Apportionment—Review of apportionment

The House of Representatives, until otherwise provided by law, shall consist of not more than one hundred and nine members who shall hold office for two years: Provided, That the representatives elected at the first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Eight: And Provided, That the day on which state elections shall be held shall be fixed by the Legislature.

(a) The first Legislature shall meet at the seat of government upon proclamation of the Governor on the day named in said proclamation, which shall not be more than thirty days nor less than fifteen days after the admission of the State into the Union.

(b) The apportionment of this State for members of the Legislature shall be made at the first session of the Legislature after each decennial Federal census.

(c) The whole population of the State as ascertained by the Federal census, or in such manner as the Legislature may direct, shall be divided by the number one hundred and the quotient shall be the ratio of representation in the House of Representatives for the next ten years succeeding such apportionment.

(d) Every county having a population equal to one-half of said ratio shall be entitled to one representative; every county containing said ratio and three-fourths over shall be entitled to two representatives, and so on, requiring after the first two an entire ratio for each additional representative: Provided, That no county shall ever take part in the election of more than [illegible]en representatives.

(e) When any county shall have a fraction above the ratio so large that being multiplied by five the result will be equal to one or more ratios, additional representatives shall be apportioned for such ratio among the several sessions of the decennial period. If there are two ratios, representatives shall be allotted to the fourth and third sessions, respectively; if three, the third, second, and first sessions, respectively; if four, to the fourth, third, second, and first sessions, respectively.

(f) Any county forming with another county or counties a representative district during one decennial period, if it has acquired sufficient population, at a fixed decennial period, shall be entitled to an additional representative, if there shall be left in the district from which it shall have been separated a population sufficient for a representative. No such change shall be made except at the regular decennial period for the apportionment of representatives.

(g) If in fixing any decennial ratio, a county previously a separate representative district shall have less than

the number required by the ratio for a representative, such county shall be attached to a county adjoining it and become a part of such representative district.

(h) No county shall ever be divided in the formation of representative districts except to make two or more representative districts in such county. No town, or ward in a city, where it constitutes only one voting precinct, shall be divided in the formation of representative districts, nor shall any representative district contain a greater excess in population over an adjoining district in the same county than the population of a town or ward in a city, constituting only one voting precinct adjoining such district. Counties, towns, or wards in cities, constituting only one voting precinct, which, from location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants.

(i) Ascertaining the ratio of representation according to the Federal census, or such other enumeration as the Legislature may provide, and attaching any county, previously having a separate representative but found to have less than the number required by the ratio, to an adjoining county; and determining the number of representatives each county or district shall be entitled to, and for what sessions of the Legislature within the next decennial period; and apportioning the Senators, shall be done by the Legislature and be presented to the Governor for his approval in the same manner as other bills which may be passed by the Legislature.

(j) An apportionment by the Legislature shall be subject to review by the Supreme Court at the suit of any citizen, under such rules and regulations as the Legislature may prescribe. And such court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promply for the dsposal of the same.

APPENDIX VIII.

(a) Article V, Section 11, Constitution of Oklahoma. (Volume I, pp. 65-66, Oklahoma Statutes 1961).

§ 11. Senatorial districts—Composition and number of senators

Until the apportionment is made by the Legislature after the next Federal decennial census, the State, except as otherwise provided, shall be divided into thirty-three senatorial districts, each of which shall be composed of the counties as named, shall be numbered and elect senators as follows, namely:

First, Beaver, Cimarron, Harper, and Texas, one senator; Second, Beckham, Dewey, Ellis, and Roger Mills, two senators; Third, Woods and Woodward, one senator; Fourth, Greer, one senator; Fifth, Jackson and Tillman, one senator; Sixth, Custer, Kiowa, and Washita, two senators; Seventh, Alfalfa and Major, one senator; Eighth, Garfield, one senator; Ninth, Osage, Grant, and Kay, two senators; Tenth, Noble and Pawnee, one senator; Eleventh, Creek and Payne, one senator; Twelfth, Logan, one senator; Thirteenth, Lincoln and Pottawatomie, two senators; Fourteenth, Canadian and Oklahoma, two senators; Fifteenth, Caddo and Grady, two senators; Sixteenth, Blaine and Kingfisher, one senator; Seventeenth, Comanche, Jefferson, and Stephens, two senators; Eighteenth, Carter, Love, and Murray, two senators; Nineteenth, Cleveland, Garvin, and McClain, two senators; Twentieth, Atoka, Byran, and Coal, two senators; Twenty-first, Latimer and ~~Le~~ Flore, one senator; Twenty-second, Hughes and Okfuskee, one senator; Twenty-third, Pontotoc and Seminole, one senator; Twenty-fourth, Choctaw, McCurtain, and Pushmataha, one senator; Twenty-fifth, Pittsburg, one senator; Twenty-sixth, Marshall and Johnson, one senator; Twenty-seventh, Haskell, McIntosh,

and Muskogee, two senators; Twenty-eighth, Adair and Sequoyah, one senator; Twenty-ninth, Mayes and Craig, one senator; Thirtieth, Ottawa, Delaware, and Cherokee, one senator; Thirty-first, Tulsa and Washington, one senator; Thirty-second, Okmulgee and Wagnor, one senator; Thirty-third, Nowata and Rogers, one senator.

(b) Title 14, Sections 9-72, incl., Oklahoma Statutes 1961. (Volume I, pp. 1042-1046, incl., Oklahoma Statutes 1961).

§ 9. Nominating districts—Nominations—Voting

The Second Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two nominating districts; Roger Mills, Ellis and Dewey Counties shall constitute one nominating district and shall nominate a candidate for the State Senate in the primary election of 1942, and each four years thereafter; Beckham County shall constitute a nominating district and shall nominate a candidate for the State Senate in said district at the primary election of 1944, and each four years thereafter; and the candidates so nominated in said districts shall be voted for at the general election following such nomination by all the qualified electors in said Second Senatorial District.

§ 10. Sixth district—Nominating districts

The Sixth Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two (2) nominating districts: Washita and Kiowa Counties shall constitute one (1) nominating district and shall nominate a candidate for the State Senate at the primary election of 1942, and each four (4) years thereafter; Custer County shall constitute a nominating district and shall nominate a candidate for the State Senate in said District at the primary election of 1944, and each four (4) years thereafter;

and the candidates so nominated in said Districts shall be voted for at the general election following such nomination by all of the qualified electors in said Senatorial District.

§ 11. Ninth and thirty-first districts

From and after the passage of this Act, the Ninth Senatorial District of the State of Oklahoma shall be comprised of the Counties of Grant and Kay; the Thirty-first Senatorial District shall be comprised of the County of Tulsa.

§ 12. Thirty-fourth district

There is hereby created a Senatorial District to be numbered and known as the Thirty-fourth Senatorial District which shall be comprised of the territory embraced within the Counties of Osage and Washington.

§ 13. Number of senators

Hereafter each of said Senatorial Districts shall be represented by one Senator.

§ 14. Election of senators

At the election held in 1920, and each four years thereafter, there shall be elected one Senator from Senatorial District Number Thirty-four; provided, the Senator representing the Ninth Senatorial District, who is a resident of the territory embraced within the Thirty-fourth Senatorial District, shall represent the Thirty-fourth Senatorial District in the State Senate until a successor shall be elected, as hereinabove provided. Provided further, that at the election held in 1922, and every four years thereafter, there shall be elected one Senator each from Senatorial Districts Number Nine and Number Thirty-one.

§ 21. Thirteenth district—Nominating districts

The Thirteenth Senatorial District shall be divided into two nominating districts, Lincoln County constituting one

nominating district, and Pottawatomie County shall constitute one nominating district; and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated to be voted for at the general election, by all the qualified electors of said district.

§ 22. Fifteenth District—Nominating districts

The Fifteenth Senatorial District shall be divided into two nominating districts; Grady County constituting one nominating district, and Caddo County shall constitute one nominating district, and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated, to be voted for at the general election by all qualified electors of said district.

§ 31. Nominating districts

The Fourteenth Senatorial district shall be divided into two nominating districts, Canadian County constituting one nominating district, and Oklahoma County constituting another nominating district; and the qualified electors of said respective nominating districts as herein created shall each nominate a candidate for State Senator in said district as provided by law; and the candidate so nominated to be voted for at the general election by all the qualified electors of the said fourteenth Senatorial district.

§ 32. Nominations—Primary elections—District election—Additional senator

From each of said nominating districts candidates for State Senator of the State of Oklahoma, shall be nominated by political parties, or by petitioners of the respective districts, in the manner provided by law, and such candidates shall be voted for in the primary election to be held as provided by law in each of the nominating districts, and after

being nominated as herein provided, and as provided by law, the qualified voters and electors of the Senatorial district at large shall vote on all nominations so made; and no electors at such election shall vote for more than one candidate from each district at said election, unless there shall be added additional and further senators to said district other than those now provided for, and if a further or additional senator shall be provided so as to make three in said Senatorial district, then one of said senators shall be nominated from Canadian County, and the remaining senator or senators shall be nominated from Oklahoma County, and all of the senators thus nominated shall be elected as provided by law.

§ 33. Time for nominations and elections—Intention of act—Number and residence

Canadian County in the nominating district in this act created, shall nominate in said nominating district, one State senator, to be elected in said district at the August primary as provided by law in the year 1918 and such senator so nominated at said primary shall be voted for at the November election in the year 1918, and each four years thereafter. The senator or senators provided by law in said district, other than the one provided for as to Canadian County, shall be nominated at the August primary 1920, and elected at the November election, 1920, and every four years thereafter.

It being the intention of the provisions of this act to give to Canadian County one nominating district for one State senator in said district, and Oklahoma County one nominating senatorial district for one State senator in said district, and Oklahoma County one nominating senatorial district for one or more senators as may be provided by law in said district, provided always, that said district shall be entitled by law to two senators or more, and it further being the intention of this act that one senator shall be a

resident of Canadian County and one senator shall be a resident of Oklahoma County, the county from which the nomination shall be respectively made.

§ 41. Nominating districts—Nominations—Election.

The Seventeenth Senatorial District of the State of Oklahoma shall be divided into two nominating districts; Stephens County and Jefferson County constituting one nominating district, and Cotton County and Comanche County shall constitute one nominating district; and the qualified electors of said nominating districts, as herein created, shall each nominate a candidate for State Senator in said district, as provided by law; and the candidates so nominated shall be voted for at the general election, by all the qualified electors of said district.

§ 42. Nominations—Primary and district elections

From each of said nominating districts, candidates for State Senator of the State of Oklahoma, shall be nominated by political parties, or by petitioners of the representative districts, in the manner provided by law, and such candidates shall be voted for in the primary election to be held as provided by law in each of the nominating districts, and after being nominated as herein provided, and as provided by law, the qualified voters and electors of the Senatorial district at large shall vote on all nominations so made; and no electors at such election shall vote for more than one candidate from each district at said election.

§ 43. Time for nominations and elections

Stephens County and Jefferson County, in the nominating district in this Act created, shall nominate in said nominating district one State Senator, to be elected in said district at the August primary as provided by law in the year 1926, and such Senator so nominated at said primary shall be voted for at the November election in the year 1926, and each four (4) years thereafter. The Senator pro-

vided by law in said district comprised of Cotton County and Comanche County shall be nominated at the August primary, 1928, and elected at the November election, 1928, and every four (4) years thereafter.

§ 45.1 Eighteenth and twenty-six districts—Counties constituting

From and after the effective date of this Act, the Eighteenth (18th) Senatorial District of the State of Oklahoma shall be comprised of Carter County; the Twenty-Sixth (26th) Senatorial District shall be comprised of the Counties of Love and Marshall.

§ 45.2 Thirty-sixth district created—Counties constituting

There is hereby created a Senatorial District to be numbered and known as the Thirty-Sixth (36) Senatorial District of the State of Oklahoma, which shall be comprised of the territory embraced within the Counties of Murray and Johnston.

§ 45.3 Each district represented by one senator

Hereafter each of said Senatorial Districts shall be represented by one (1) Senator.

§ 45.4 Time of election of senators

At the general election to be held in 1942, and each four (4) years thereafter, there shall be elected one (1) Senator from Senatorial District No. 36; that at the general election to be held in 1944, and each four (4) years thereafter, there shall be elected one (1) Senator from Senatorial District No. 18, and one (1) Senator from Senatorial District No. 26.

§ 51. Nominating districts—Nominations—Election

The Nineteenth Senatorial District of the State of Oklahoma, as now constituted by law, shall be divided into two Nominating Districts; Cleveland and McClain Counties

shall constitute one Nominating District and shall nominate a candidate for the State Senate in the primary election of 1934, and each four years thereafter; Garvin County shall constitute a Nominating District and shall nominate a candidate for the State Senate in said District at the primary election of 1936, and each four years thereafter; and the candidates so nominated in the said districts shall be voted for at the general election following said nomination by all of the qualified electors in said Nineteenth Senatorial District.

§ 52. Twentieth and twenty-fourth districts

From and after the passage of this Act, the Twentieth Senatorial District of the State of Oklahoma shall be comprised of the counties of Bryan and Choctaw; the Twenty-fourth Senatorial District shall be comprised of the Counties of Pushmataha and McCurtain.

§ 53. Thirty-fifth district

There is hereby created a Senatorial District to be numbered and known as the Thirty-fifth Senatorial District, which shall be comprised of the territory embraced within the Counties of Coal and Atoka.

§ 54. Number of senators

Hereafter each of said Senatorial Districts shall be represented by one Senator.

§ 55. Election of senators

At the election held in 1938, and each four years thereafter, there shall be elected one Senator from Senatorial District Numbered Thirty-five; provided, the Senator representing the Twentieth Senatorial District, and whose office expires in 1938, shall represent the Thirty-fifth Senatorial District in the State Senate until a successor shall be elected as hereinabove set forth; provided, further, that the Senator now representing the Twentieth District, who was

elected at the election in 1936, and the Senator now representing the Twenty-fourth District, who is a resident of the territory embraced within said District, shall continue to represent said Senatorial Districts Numbered Twenty and Twenty-four, respectively, until 1940; provided, further, that at the election held in 1940, and every four years thereafter, there shall be elected one Senator from Senatorial Districts Number Twenty and Twenty-four.

§ 61. Nominating districts—Nominations—Election

The twenty-seventh senatorial district of the State of Oklahoma shall be divided into two nominating districts; Muskogee County constituting one nominating district and Haskell and McIntosh Counties shall constitute one nominating district, and the qualified electors of said nominating districts, herein created, shall each nominate a candidate for state senator in said district, as provided by law, and the candidate, so nominated, shall be voted for at the general election by all the qualified electors of said district.

§ 62. Nominations—Primary elections—District election

From each of said nominating districts, candidates for state senator of the State of Oklahoma shall be nominated by political parties or by petitioners of the representative district in the manner provided by law, and such candidates shall be voted for in the primary election to be held, as provided by law, in each nominating district, and after being nominated, as herein provided, and at provided by law, the qualified voters and electors and the senatorial district at large, shall vote on all nominations, so made, and no elector at such election shall vote for more than one candidate from each district at said election.

§ 63. Time for nominations and elections

Muskogee County, in the nominating district, in this Act created, shall nominate in said nominating district one state senator, to be nominated in said district at the August

primary, as provided by law, in the year 1926, and such senator, so nominated, at the said primary, shall be voted for at the November election in the year 1926 and each four years thereafter. The senator, provided by law in said district, comprised of Haskell and McIntosh Counties shall be nominated at the August primary, 1928, and elected at the November election in 1928 and every four years thereafter.

§ 71. Twenty-eighth district—Counties comprising

From and after the passage of this Act the Twenty-eighth Senatorial District of the State of Oklahoma shall be comprised of Adair, Cherokee and Sequoyah Counties.

§ 72. Thirtieth district—Counties comprising

From and after the passage of this Act the Thirtieth Senatorial District of the State of Oklahoma shall be comprised of Ottawa and Delaware Counties.

APPENDIX IX.

Title 14, Sections 97-100, incl., Oklahoma Statutes 1961 (Volume I, pp. 1047-1051, incl., Oklahoma Statutes 1961).

§ 97. Decennial legislative period—Biennial legislative periods or sessions—Election of representatives

The ten-year period beginning the 16th day after the general election in November, 1962, and ending the 15th day after the general election in November, 1972, shall constitute a Decennial Legislative Period, unless otherwise provided by law. And the period is hereby divided into five legislative periods or sessions of two years each with the number of representatives assigned to each county for each of the legislative periods to be those shown in Section 3 of this Act.

Representatives assigned to each county for each of the five legislative periods shall be elected at the general election in the month of November next preceding the commencement of the respective legislative period.

Unless otherwise provided by law the representatives assigned to each county for each legislative period shall be nominated and elected at large by the electors of the respective counties.

§ 98. Legislative periods

Legislative periods provided for in Section 1 of this Act shall cover these periods:

(a) The first legislative period shall begin on the 16th day after the general election in November, 1962, and end with the 15th day after the general election in November, 1964.

(b) The second legislative period shall begin on the 16th day after the general election in November, 1964, and end with the 15th day after the general election in November, 1966.

(c) The third legislative period shall begin on the 16th day after the general election in November, 1966, and end with the 15th day after the general election in November, 1968.

(d) The fourth legislative period shall begin on the 16th day after the general election in November, 1968, and end with the 15th day after the general election in November, 1970.

(e) The fifth legislative period shall begin on the 16th day after the general election in November, 1970, and end with the 15th day after the general election in November, 1972.

§ 99. Representation of each county in each period

Until another apportionment of the House of Representatives shall be made in accordance with the terms of the Constitution and laws of Oklahoma, the House of Representatives shall be composed of the representation listed in the table below, and this representation shall be the legislative apportionment of the House of Representatives for each of the five periods, as established in Section 2 of this Act.

The legislative apportionment by legislative periods are hereby fixed as follows, subject, however, to such change as may be required by operation of Section 6 of this Act.

COUNTIES	FIRST PERIOD	SECOND PERIOD	THIRD PERIOD	FOURTH PERIOD	FIFTH PERIOD
Adair	1	1	1	1	1
Alfalfa	1	1	1	1	1
Atoka	1	1	1	1	1
Beaver	1	1	1	1	1
Beckham	1	1	1	1	1
Blaine	1	1	1	1	1
Bryan	2	2	2	2	2
Caddo	2	2	2	2	2
Canadian	2	2	2	2	2
Carter	2	2	2	2	2
Cherokee	1	1	1	1	1
Choctaw	1	1	1	1	1
Cimarron	1	1	1	1	1
Cleveland	3	3	3	3	3
Coal	1	1	1	1	1
Comanche	4	4	4	4	4
Cotton	1	1	1	1	1
Craig	1	1	1	1	1
Creek	2	2	2	2	2
Custer	1	1	1	1	1
Delaware	1	1	1	1	1

Dewey	1	1	1	1	1
Ellis	1	1	1	1	1
Garfield	3	3	3	3	3
Garvin	2	2	2	2	2
Grady	2	2	2	2	2
Grant	1	1	1	1	1
Greer	1	1	1	1	1
Harmon	1	1	1	1	1
Harper	1	1	1	1	1
Haskell	1	1	1	1	1
Hughes	1	1	1	1	1
Jackson	2	2	2	2	2
Jefferson	1	1	1	1	1
Johnston	1	1	1	1	1
Kay	3	3	3	3	3
Kingfisher	1	1	1	1	1
Kiowa	1	1	1	1	1
Latimer	1	1	1	1	1
Le Flore	2	2	2	2	2
Lincoln	1	1	1	1	1
Logan	1	1	1	1	1
Love	1	1	1	1	1
McClain	1	1	1	1	1
McCurtain	2	2	2	2	2
McIntosh	1	1	1	1	1
Major	1	1	1	1	1
Marshall	1	1	1	1	1
Mayes	1	1	1	1	1
Murray	1	1	1	1	1
Muskogee	3	3	3	3	3
Noble	1	1	1	1	1
Nowata	1	1	1	1	1
Okfuskee	1	1	1	1	1
Oklahoma	7	7	7	7	7
Okmulgee	2	2	2	2	2
Osage	2	2	2	2	2

Ottawa	2	2	2	2	2
Pawnee	1	1	1	1	1
Payne	2	2	2	2	2
Pittsburg	2	2	2	2	2
Pontotoc	2	2	2	2	2
Pottawatomie	2	2	2	2	2
Pushmataha	1	1	1	1	1
Roger Mills	1	1	1	1	1
Rogers	1	1	1	1	1
Seminole	2	2	2	2	2
Sequoyah	1	1	1	1	1
Stephens	2	2	2	2	2
Texas	1	1	1	1	1
Tillman	1	1	1	1	1
Tulsa	7	7	7	7	7
Wagoner	1	1	1	1	1
Washington	2	2	2	2	2
Washita	1	1	1	1	1
Woods	1	1	1	1	1
Woodward	1	1	1	1	1
Total	120	120	120	120	120

§ 100. Division of certain counties into legislative districts

(a) Oklahoma County shall be divided into seven (7) legislative districts as follows:

(1) Legislative District No. 1, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue and Reno Street and extending along the center line of Reno Street to the center line of High Avenue; thence south to the center line of Southeast 15th Street, Oklahoma City; thence west to the center line of Western Avenue; thence south along the center line of Western Avenue to the center line of Southwest 29th Street, Oklahoma City; thence west to the center line of Pennsylvania Avenue; thence south to the center line

of Grand Boulevard; thence west to the western boundary of Section 18, Township 11 North, Range 3 West; thence south of said boundary to the Cleveland County line; thence west to the intersection of the Oklahoma County County line; thence north along the western boundary of Oklahoma County to the northwest corner of Deer Creek Township; thence east along the northern boundary of Oklahoma County to the intersection thereof with the Edmond Township; thence south along the western boundary of Range 3 West to the corporate limits of Oklahoma City; thence south on the center line of May Avenue to the center line of Reno Street and point of beginning.

(2) Legislative District No. 2, Oklahoma County, shall contain the following described territory: Beginning at the intersection of High and Reno Streets in Oklahoma City and extending north on the center line of High Avenue, or western boundary line of Section 35, Township 12 North, Range 3 West, to the intersection of Northeast 10th Street; thence east on the center line of Northeast 10th Street and Alice Street to the corporate limits of Oklahoma City; thence east on the southern boundary line of Section 25, Township 12 North, Range 3 West, to the western boundary of Crutcho Township; thence east to the county line; thence south to the county line; thence west to the intersection of county line with the western boundary of Section 31, Township 11 North, Range 3 West; thence north along said line to the corporate limits of Oklahoma City or Grand Boulevard; thence east on center line of Grand Boulevard to Pennsylvania Avenue, Oklahoma City; thence north along center line of Pennsylvania Avenue to the center line of Southwest 29th Street; thence east to the center line of Western Avenue; thence north to the center line of Southwest 15th Street; thence east to the center line of High Avenue or point of beginning.

(3) Legislative District No. 3, Oklahoma County, shall contain the following described territory: Beginning at the

intersection of Pennsylvania Avenue and Northwest 36th Street, and extending east along the center line of Northwest 36th Street to the center line of Western Avenue; thence south along the center line of Western Avenue to the center line of Northwest 23rd Street; thence east along the center line of 23rd Street to the center line of Harvey Avenue; thence south along the center line of Harvey Avenue to the center line of Northwest 10th Street; thence west along the center line of Northwest 10th Street to the center line of Pennsylvania Avenue and thence north along said center line to Northwest 36th Street, or place of beginning.

(4) Legislative District No. 4, Oklahoma County, shall contain the following described territory: Beginning at the intersection of North Harvey Avenue and Northwest 23rd Street in Oklahoma City, and extending east along the center line of Northwest 23rd and Northeast 23rd Streets to Kelley Avenue; thence north along the center line on Kelley Avenue to its intersection with Northeast 50th Street; thence east along the center line of Northeast 50th Street to the western boundary of Crutcho Township; thence south along the western boundary of Crutcho Township to the center of Northeast 10th Street; thence west along the center line of Northeast 10th Street and Northwest 10th Street to the center line of North Harvey Avenue; thence north along the center line of North Harvey Avenue to the point of beginning.

(5) Legislative District No. 5, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue, and Northwest 10th Street, and extending east along the center line of Northwest 10th Street and Northeast 10th Street to the center line of Kelley Avenue; thence south along the center line of Kelley Avenue and High Street to the center line of Reno Avenue; thence west along the center line of Reno Avenue to the center line of May Avenue; thence north along the center

line of May Avenue, to the center line of Northwest 10th Street or place of beginning.

(6) Legislative District No. 6, Oklahoma County, shall contain the following described territory: Beginning at the intersection of Northwest 23rd Street and Western Avenue; thence east along the center line of Northwest 23rd Street and Northeast 23rd Street to Kelley Avenue; thence north along the center line of Kelley Avenue to the intersection of Northeast 50th Street; thence east along the center line of Northeast 50th Street to the western boundary of Crutcho Township; thence south along the western boundary of Crutcho Township to its intersection with Northeast 10th Street; thence east along the center line of Northeast 10th Street extended to the Pottawatomie County line; thence north along the eastern boundary to Elk, Dewey and Luther Townships to the Logan County line; thence west along said line and the north line of Luther, Deepfork and Lincoln Townships to the Edmond Township line; thence south along the western boundary of Lincoln and Hartzell Townships to the Oklahoma Township line; thence west along said Township line to the center of North Western Avenue; thence south along the center line of North Western Avenue to the intersection of same with Northwest 23rd Street or the point of beginning.

(7) Legislative District No. 7, Oklahoma County, shall contain the following described territory: Beginning at the intersection of May Avenue and Northwest 10th Street and extending east along the center line of Northwest 10th Street to the center line of Pennsylvania Avenue; thence north along the center line of Pennsylvania Avenue to the center line of Northwest 36th Street; thence east along the center line of Northwest 36th Street to the center line of Western Avenue; thence north along the center line of North Western Avenue to the corporate limits of Oklahoma City; thence north along the western boundary of Sections 9 and 4, Township 12 North, Range 3 West to the Britton

Township line; thence east along the Britton Township line to the western boundary of Hartzell Township; thence north along the western boundary of Hartzell and Lincoln Township to the Logan County line; thence west six miles to the western boundary of Edmond Township; thence south along the western boundary of Edmond, Britton and Oklahoma Townships to the corporate limits of Oklahoma City; thence south to the center line of May Avenue, to the intersection of Northwest 10th Street or point of beginning.

(b) Garfield County shall be divided into three (3) legislative districts as follows:

(1) Legislative District No. 1 and Legislative District No. 2 shall consist of the City of Enid. Candidates in these districts shall be residents of such districts and shall be nominated in primary elections by the electors of these districts and elected in the general elections by the electors of these districts.

(2) Legislative District No. 3 shall consist of all of Garfield County not embraced in District No. 1 and District No. 2. Candidates in this district shall be residents of this district and shall be nominated and elected by the electors of the district.

(c) Creek County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the City of Sapulpa, the Town of Kiefer, and the following townships: Mannford, Hazlip, Sapulpa, Kellyville, and Mounds.

(2) Legislative District No. 2 shall include the cities of Drumright and Bristow and the following townships: Tiger, Olive, Shannon, Depew, Bristow, Sunnyslope, Lakeside, Newby, and Euchee.

Candidates in these districts shall be electors of such districts and shall be nominated in primary elections by

the electors of these districts and elected in the general elections by the electors of the county at large.

(d) Le Flore County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the following election precincts as now established or as may hereafter be changed or altered:

Cowlington Pct. No. 1, Tucker Pct. No. 2, Spiro Pct. No. 1, Spiro Pct. No. 2, Spiro Pct. No. 3, Braden Pct. No. 1, Skulleyville Pct. No. 2, Pocola Pct. No. 1, Arkoma Pct. No. 2, Bokoshe Pct. No. 1, Bokoshe Pct. No. 2, Bokoshe Pct. No. 3, Milton Pct., Cameron Pct. No. 1, Williams Pct. No. 2, Rock Island Pct. No. 3, Tahoma Pct. No. 4, Shady Point Pct. No. 1, Panama Pct. No. 2, Hill Pct. No. 1, Gilmore Pct. No. 2, Monroe Pct., Tarby Pct. No. 2, Fairview Pct. No. 3, Calhoun Pct. No. 1, Walls Pct. No. 2, Wister Pct. No. 1, Fanshawe Pct. No. 2, Kennedy Pct. No. 3.

(2) Legislative District No. 2 shall include the following election precincts as now established or as may hereafter be changed or altered:

Poteau City Ward No. 1, Poteau City Ward No. 2, Poteau City Ward No. 3, Poteau City Ward No. 4, Howe Pct. No. 1, Howe Pct. No. 2, Glendale; Howe Pct. No. 3, Oakridge Pct. No. 4, Heavener City Ward No. 1, Heavener City Ward No. 2, Heavener City Ward No. 3, Heavener City Ward No. 4, Summerfield Pct. No. 1, Le Flore Pct. No. 2, Heavener Twp. Pct. No. 2, Reichert Pct. No. 3, Norman Pct. No. 4, Independence Pct. No. 5, Conser Pct. No. 1, Hodgen Pct. No. 2, Hontubby Pct. No. 3, Stapp Pct. No. 4, Page Pct. No. 1, Haw Creek Pct. No. 2, Muse Pct. No. 1, Big Cedar Pct. No. 2, Octavia Pct. No. 1, Cusher Pct. No. 2, Burkhart Pct. No. 3, Talihina Pct. No. 1, Forest Grove Pct. No. 2, Whitesboro Pct. No. 3, Forrester Pct. No. 6, Forest Hill Pct. No. 7, Midway Pct. (Monroe Twp.).

(3) In order to file as a candidate in either district the candidate must have lived the six (6) months immediately preceding filing date in said district, and the candidates so filing shall be voted on in primary elections by the electors of their particular district, and shall be voted on in the general election by the electors of the county at large.

(c) Payne County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall include the following townships as in existence at the time of the effective date of this Act: Rose, Pawnee, Cimarron, Mound, Eagle, Union, Indian, Clayton, Henry, and Glencoe.

(2) Legislative District No. 2 shall include all of Payne County not embraced in Legislative District No. 1, as created by this Act.

(3) Candidates in these districts shall be electors of such districts and shall be nominated in the primary elections by the electors of the respective district and elected in the general elections by the electors in the respective lgislative district.

(f) Seminole County shall be divided into two (2) legislative districts as follows:

(1) Legislative District No. 1 shall be composed of the following townships: Red Mound, Brown, Miller, Lincoln, and Konawa.

(2) Legislative District No. 2 shall be composed of the following townships: Econtuchka and Wolf.

(3) Candidates in these districts shall be electors of such districts and shall be nominated in the primary elections by the electors of the respective district and elected in the general elections by the electors in the respective legislative district.

APPENDIX X

(a) Article V, Sections 1-4, incl., Constitution of Oklahoma (Volume I, pp. 62-63, Oklahoma Statutes 1961).

§ 1. Legislature—Authority and composition—Powers reserved to people

The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

§ 2. Designation and definition of reserved powers—Determination of percentages

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

§ 3. Petitions—Veto power—Elections—Time of taking effect—Style of bills—Duty of legislature

Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to the people of the State shall be had at the next election held throughout the State, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the initiative shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

The style of all bills shall be: "Be it Enacted By the People of the State of Oklahoma."

Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State and addressed to the Governor of the State, who shall submit the same to the people. The Legislature shall make suitable provisions for carrying into effect the provisions of this article.

§ 4. Referendum against part of act

The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislature in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of such act from becoming operative.

(b) Article XXIV, Sections 1 and 3, Constitution of Oklahoma (Volume I, p. 137, Oklahoma Statutes 1961).

§ 1. Amendments proposed by Legislature—Submission to vote

Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, at the next regular general election, except when the Legislature, by a two-thirds vote of each house, shall order a special election for that purpose. If a majority of all the electors voting at such election shall vote in favor of any amendment thereto, it shall thereby become a part of this Constitution.

If two or more amendments are proposed they shall be submitted in such manner that electors may vote for or against them separately.

No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition. As amended State Question No. 353, Referendum Petition No. 100. Adopted primary election July 1, 1952.

§ 3. Right of amendment by initiative petition not impaired

This article shall not impair the right of the people to amend this Constitution by a vote upon an initiative petition therefor.

APPENDIX XI

State Question No. 408 Initiative Petition No. 271

"WARNING"

It is a felony for anyone to sign an initiative or referendum petition with any name other than his own, or knowingly to sign his name more than once for the measure, or to sign such petition when he is not a legal voter.

Not Over Forty Names Allowed on a Petition of This Nature

(LABEL)

INITIATIVE PETITION

TO THE HONORABLE J. HOWARD EDMONDSON, GOVERNOR OF OKLAHOMA:

We, the undersigned citizens and legal voters of the State of Oklahoma, respectfully order that the following proposed amendment to the Constitution shall be submitted to the legal voters of the State of Oklahoma for their approval or rejection at the regular general election to be held on the 6th day of November, A.D. 1962, or at a special election which might be called for said purpose, and each for himself says:

"I have personally signed this petition; I am a legal voter of the State of Oklahoma; my residence and postoffice are correctly written after my name. The time for filing this petition expires ninety days from the 29th day of September, 1961. The question we herewith submit to our fellow voters is:

"Shall the following proposed amendment to the Constitution be approved?"

TITLE

A CONSTITUTIONAL AMENDMENT PROVIDING METHOD FOR ENFORCEMENT OF THE PRESENT CONSTITUTIONAL FORMULAE APPORTIONING MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATE; VESTING THIS DUTY IN THE ATTORNEY GENERAL, SECRETARY OF STATE AND STATE TREASURER ACTING EX-OFFICIO AS A LEGISLATIVE APPORTIONMENT COMMISSION; CONFERRING ORIGINAL JURISDICTION UPON STATE SUPREME COURT TO REVIEW ANY APPORTIONMENT UPON PETITION OF ANY QUALIFIED ELECTOR UNDER PRESCRIBED CONDITIONS; DEFINING SENATORIAL TERMS; REQUIRING ELECTIONS IN ACCORDANCE WITH APPORTIONMENTS; DECLARING AMENDMENT SELF-EXECUTING; REPEALING SUBSECTIONS a, b, i and j, SECTION 10, AND AMENDING SECTIONS 11-16 INCLUSIVE, ARTICLE V, CONSTITUTION OF OKLAHOMA.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA, AS A CONSTITUTIONAL AMENDMENT WHICH REPEALS SUBSECTIONS a, b, i AND j OF SECTION 10, ARTICLE V, CONSTITUTION OF OKLAHOMA AND WHICH AMENDS SECTIONS 11, 12, 13, 14, 15 AND 16 THEREOF TO READ AS FOLLOWS:

§11. The duty of apportioning the Legislature under the provisions of this Article is exclusively vested in a Legislative Apportionment Commission composed of the Attorney General, Secretary of State and the State Treasurer. The Legislature is prohibited from passing any Act or Resolution pertaining to the apportionment of the Legislature other than a Resolution submitting to the people an amendment to this Article.

§12(a). The Commission shall make the first apportionments according to the formulae provided in this Article within 45 days following the adoption of this Amendment, and thereafter within 45 days following the official certification of each Federal decennial census. The enumeration of the most recent Federal decennial census shall always be used in ascertaining population.

(b). Each Order of Apportionment of the Senate and House of Representatives shall be in writing and shall be filed with the Secretary of State and shall be signed by at least two members of the Commission.

§13(a). Any qualified elector may seek a review of any apportionment within thirty days from the filing thereof by filing in the Supreme Court of Oklahoma a petition which must set forth a proposed apportionment more nearly in accordance with this Article. Any apportionment of either the Senate or House of Representatives from which review is not sought within such time shall become final.

(b). Upon review the Supreme Court shall determine which apportionment results in the minimum variance of population between districts and otherwise complies with this Article and by appropriate writ, require the same to be filed or refiled, as the case may be, with the Secretary of State forthwith and such apportionment shall become final on the date of said writ.

(c). The Supreme Court, upon petition of any qualified elector alleging failure of the Commission to timely act, is hereby vested with original jurisdiction to compel, and shall compel, the Commission to make the apportionments as herein provided. It shall also have exclusive jurisdiction of any review hereunder. The Court shall give precedence to any proceeding arising under this Section, and if more than one petition be filed, it shall consolidate

such proceedings for hearing and disposition, and shall file its opinion and issue its writ within ninety days from the timely filing of such last petition. In the event any action filed hereunder shall be abandoned or dismissed any other qualified elector shall be allowed to intervene within ten days thereof.

§14. Any apportionment of the Senate or the House of Representatives shall become effective immediately prior to the first filing period for any statewide Primary Election after such apportionment of either said Senate or House of Representatives has become final. The term of all Senators shall expire 15 days after the first general election following any Senatorial apportionment becoming effective regardless of the term for which elected. Senators representing even numbered districts shall, after each apportionment, be elected for an initial term of two years, notwithstanding Section 9.

§15. After any apportionment becomes both final and effective, the State Election Board shall accept filings and conduct the Primary and General Elections in accordance with such apportionment.

§16. The provisions of Sections 9 through 16 of this Article are hereby declared to be self-executing. Existing sub-sections a, b, i and j of Section 10, Article V, Constitution of Oklahoma, are hereby repealed and Sections 11, 12, 13, 14, 15 and 16 thereof as they heretofore existed are likewise repealed and the amendments above set forth are substituted therefor.

Office-Supreme Court, U.S.
FILED
JAN 22 1963
JOHN F. DAVIS, CLERK

Nos. 688 - 689

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. .....

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants;
and
M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY McCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. McCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma,
Appellants;
VERSUS
HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS

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Oklahoma City, Oklahoma.

January, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

INDEX

	PAGE
Object	1
Facts	2
A. History of Action	2
B. No One Restrained	6
C. Initiative Will Not Afford Relief	7
D. Invidious Discrimination Admitted	8
Factual Conclusions	8
Prayer	9

AUTHORITIES CITED

CASES:

Baker v. Carr, decided March 26, 1962	2
Jones v. Freeman, 146 P.2d 564	5, 6

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, XIV Amendment	4, 5
Oklahoma Constitution, Art. V, §6	7
Oklahoma Constitution, Art. V, §9(a)	5
Oklahoma Constitution, Art. V, §§ 9(a), 9(b)	5
Oklahoma Constitution, Art. V, §9(a), §10(c)	4
Oklahoma Constitution, Art. V, §10(d)	5

In the
Supreme Court of the United States

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and

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HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS

OBJECT

This Motion to Dismiss is directed to the Jurisdictional Statement of the Oklahoma Farm Bureau and Lewis H.

Munn, appellants, and likewise to the Jurisdictional Statement of M. A. Price, *et al.* Both arise from the same proceeding before a three-judge court. Both groups of appellants were intervening defendants in that action.

FACTS

A. History of Action

Plaintiff instituted his action in the United States District Court for the Western District of Oklahoma on January 31, 1961. No material action was taken pending the ruling in *Baker* v. *Carr*, decided March 26, 1962.

Thereafter a hearing on April 23, 1962, resulted in a 2-1 decision denying immediate injunctive relief. Those seeking relief did not appeal. Appellants, Price, Rasberry and Hutchens, were allowed to intervene at said hearing and did participate therein. As shown by the opinion of the lower court this relief was denied as a result of their representations. The court said (Appendix xii):

> "A majority of the Court has reluctantly declined immediate interlocutory relief in the form of an injunction forbidding the forthcoming May 1, 1962 primary election, or alternatively, ordering the election to be conducted at large. Our reasons may be summarized as follows:
>
> "Because of the Intervenors' tendered issue of rationality, the drastic and unprecedented relief sought is deemed inappropriate. The effect of such injunctive decree would be to disrupt a long established electoral system on unsettled facts."

Thereafter a pre-trial ensued and the matter again came on for hearing on the merits on June 12. In its June 19 opinion covering the June 12 hearing the court dwelt at some length upon the appellants' offer "to show in retrospect a rational basis for the disparity," which offer caused injunctive relief to be denied at the earlier hearing (Appendix xxix. The appendix in each jurisdictional statement is identical except Price, *et al.*, did not include the last document included in the other.) The court fully explained and justified its failure to grant the appellants any additional time, pointing out that "more than fifty days have elapsed since the denial of temporary relief," that the information requested "is and has been, at all times readily available in the form of public records to the Intervenors, or for that matter, to any interested person," and stated:

> "We are thus brought to the conclusion that if the Intervenors have a defense, based upon the rationality of the present apportionment, they have not diligently pursued it. The continuance is consequently denied." (Appendix xxxii.)

However, ample evidence was offered that did show an invidious discrimination existed, whereupon the court made a finding that the apportionment laws of the State of Oklahoma were invidiously discriminatory, but continued the matter to July 31 for a hearing on the relief to be afforded.

Appellants subsequently thereto filed a Motion to Alter or Amend Decree which was overruled at the July 31 hearing orally and specifically in the August 3 Decree (Appendix xli).

Prior to the lengthy hearing on July 31 and August 1, which culminated in the Decree and the Dissenting Opinion of August 3 all the remainder of the appellants were permitted to intervene over the objections of plaintiff that they would seek to delay the action and change the issues.

All intervenors at the time of intervention accepted the issues as drawn and the record as theretofore made, and agreed to take no action which delayed an orderly disposition of the case on its merits.

At the July 31-August 1 hearings the intervenors were allowed to introduce testimony, purportedly sustaining their contention that the Legislature should and would reapportion itself if given an additional opportunity, and unrelated and unexplained statistics which were represented as sustaining the contention that the census should not be used as a means of apportionment although its use is required by the Oklahoma Constitution, Art. V, § 9(a) and § 10(c). No alternative means of determining fair apportionment was ever proposed by anybody, including appellants.

Thereafter the lower court stayed its hand until March 8, 1963, to allow the Legislature to meet and act. The Legislature convened in regular session on January 8, 1963. However, the Court did outline certain "guide lines or standards" so that the Legislature might be apprised of the court's interpretation of the XIV Amendment as applied to the pertinent provisions of the Oklahoma Constitution.

The three-judge court made clear that the Oklahoma Constitution could be used as a means of apportionment so

long as it did not conflict with the XIV Amendment. Two questions were raised and answered, however, relating to the application of the XIV Amendment to specific provisions.

1. The provision of Art. V, § 10(d), establishing a ceiling of seven on the number of representatives any county might have "violates the XIV Amendment." (Appendix xlii.)

2. The "irreconcilable incongruity" caused by the "except clause" of Art. V, § 9(a), was resolved "in favor of equality of representation, which is mentioned three times in Sections 9(a) and 9(b), believing as we do that it is in consonance with the general principle of the Oklahoma Constitution, as construed by the Oklahoma Supreme Court in Jones v. Freeman, 146 Pac. (2d) 564, and more nearly conforms to the equal protection clause." (Appendix xliii.)

It should be pointed out that the dissenting opinions of Judge Rizley did not oppose the finding of invidious discrimination or the interpretation placed on the Oklahoma Constitution by the majority, but merely asserted that relief should be no longer denied or delayed.

The last paragraph of the August 3 Decree is:

> "Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and this case dismissed. Failing this accomplishment this Court will then order and decree

reapportionment by judicial order, in conformity with the guidance herein furnished."

In fact the only substantive order entered by the court below was entered June 19 and is as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O. S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all further elections." (Appendix xxvii.)

***B.* No One Restrained**

Such order does not constitute a restraining order upon appellant State Senators as they allege. They are not named in the order. No judicial penalty will be levied on appellants if they act contrary to the "guidelines" or even if they fail to act at all!

No one sued the legislators in this action. They voluntarily intervened. The only commandment directed to them exists in the Oklahoma Constitution, not the court order. See *Jones* v. *Freeman*, 146 P.2d 564, where the Oklahoma Supreme Court held in 1942 this was their mandatory duty. Parenthetically, twenty years later this duty is still unperformed in spite of that Court saying "the very vitals of democracy" are jeopardized by the legislators' failure to obey their oaths.

Appellants erroneously allege that a special election was enjoined to fill a Senate vacancy. Such an election was held and Senator McComas was elected. He has been seated and is serving in the legislative session in progress.

C. Initiative Will Not Afford Relief

Appellants suggest that the initiative procedure in Oklahoma constitutes relief which should prevent action by the Federal Court. The initiative petition referred to has been submitted to a vote of the people, which said petition had for its purpose stripping the Legislature of the power to reapportion and conferring the same upon an independent board of state wide elective officials. Although approved by a majority of almost 62,000 the Oklahoma Supreme Court declared it failed of passage, No. 40364, December 22, 1962 (December 29, 1962, Oklahoma Bar Journal, page 2547).

Art. V, § 6, of the Oklahoma Constitution provides a similar initiative petition cannot be again proposed within three years by less than 25 per cent of the legal voters, an almost prohibitive requirement within the ninety days allowed for the printing, circulation and filing of a completed initiative petition. Almost fourteen months elapsed from the time the defeated petition was assigned a number by the Secretary of State until the vote thereon. Actually this vote would have been further delayed by appellants, Price, *et al.*, herein had they not considered it to be to their political advantage to force the election at the general election time, November 6, 1962.

The initiative cannot reasonably be considered as relief for four to five more years. At least one or two more years are thereafter necessary, even if it is adopted, before a reapportioned Legislature would be seated. The denial of

Federal Court relief is to deny relief in Oklahoma for five to seven years even if another petition might be approved by the people and not invalidated by the State Court.

***D.* Invidious Discrimination Admitted**

Appellants Price, *et al.*, admit the Oklahoma Legislature:

1. Failed to follow the Oklahoma Constitution (p. 19, Jurisdictional Statement);
2. "Disproportion of population of constituencies under the federal census" exists in Oklahoma (p. 19);
3. Admit the use of the federal census is enjoined upon the Legislature by the Oklahoma Constitution unless another type of enumeration is provided by the Legislature (p. 14).

The three-judge court found material disparities in voting strength of over 26-1 (Appendix xxx). This constitutes at least a *prima facie* case of invidious discrimination as pointed out by the lower court (Appendix xxxi). No evidence or sound argument to the contrary was presented by the appellants!

FACTUAL CONCLUSIONS

No injunctive relief was granted. It is also obvious that this was not a final order. The lower court stated at several hearings that it did not consider its orders either final or appealable. The record makes clear that appellants are uncertain whether an appealable order has been entered. The true nature of the order of the court below was simply to hold as null and void prospectively the existing Oklahoma apportionment laws.

Notice of still another appeal to this Court by appellant has just been received by appellees. It is obvious that at least some, if not all, appellants will seek to appeal again after the three-judge court acts on March 8, 1963, making this a piecemeal appeal. Furthermore, if the Legislature should properly act, this entire proceedings becomes moot.

The lower court has been deliberate and is affording all reasonable opportunities for the state processes to be effective. Appellants were given ample opportunity to present evidence but failed to present any that controverts either the finding of invidious discrimination or the "guidelines" laid down by the court.

PRAYER

WHEREFORE, these appellees respectfully pray that the appeals herein lodged be dismissed for the following reasons:

1. No order has been issued in this cause that is appealable by appellants.
2. No injunctive relief has been granted.
3. Appellants failed to present any evidence to the three-judge court to sustain their contentions that the present apportionments are rational, or that an apportionment in conformity with the Oklahoma Constitution as interpreted by the three-judge court would be irrational and violate the XIV Amendment.
4. Appellants in effect admit the existence of invidious discrimination in Oklahoma.

5. If an appealable order was issued, the June 19 order finding invidious discrimination was not timely appealed.

6. An appeal at this time would cause piecemeal appeals. It will be time enough to review the actions of the court when a remedy has been afforded.

7. The initiative does not afford adequate relief in Oklahoma for redress of the deprivation of constitutional rights of the plaintiff.

Respectfully submitted,

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January, 1963.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 688

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY McCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. McCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE TO MOTION TO DISMISS

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SUBJECT INDEX

	PAGE
Delineation of the Issues	1
Issues Relating to Dismissal	5
Time of Appeal	5
Substance of Decree	6

AUTHORITIES CITED

CONSTITUTIONAL PROVISIONS:

Oklahoma Constitution, Art. V, Sec. 9(a) 2, 3

STATUTES:

Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. Sec. 1652 2

Act of June 24, 1949, c. 646, 62 Stat. 961, 28 U.S.C. Sec. 2101(a) 5

CASES:

Baker v. Carr, 369 U.S. 186 8

Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 7

Copeland v. Bennett, Tex. Civ. App., 243 S.W.2d 264 8

Electric Steel Foundry v. Huntley (C.C. 9th), 32 F.2d 892 8

Feinberg v. Doe, 14 Cal.2d 24, 94 P.2d 640 7

Gillis v. State of California, 293 U.S. 62 2

Government & Civic Emp. Org. Com. CIO v. Windsor, 353 U.S. 364 ..... 2, 4, 5

INDEX CONTINUED

	PAGE
Harrison v. N.A.A.C.P., 360 U.S. 167	2, 4, 5
Jones v. Freeman, 193 Okla. 554, 146 P.2d 564	2, 4
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25	2
National Fire Ins. Co. v. Thompson, 281 U.S. 331	3
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496	2, 4
Southern Pac. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498	7
United States v. Crescent Amusement Co., 323 U.S. 173	6

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 688

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY McCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. McCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE TO MOTION TO DISMISS

DELINEATION OF THE ISSUES

It is noteworthy that the motion filed herein is solely one to dismiss, rather than a Motion to Affirm or Dismiss as permissible under Rule 16. Obviously, this is an effort by appellees to divert the Court's attention from the inevitable

conclusion of reversible error should the Court adhere to its prior decisions pertinent to the action of the 3-judge Court.

For the 3-judge Court flagrantly ignored the repeated injunctions of this Court to inferior Federal Courts to adhere to the so-called "doctrine of abstention," and, where construction of State law is necessarily involved in the litigation, to abstain from any construction of State law pending an adjudication in the State Courts.[1]

Moreover, an examination of the Decree of the 3-judge Court in relation to the number of Senators required to constitute the State Senate,[2] the 3-judge Court (as presented by the Fifth Question on Appeal[3]) without warrant of the Oklahoma Constitution as construed by the Oklahoma Supreme Court in the very decision cited,[4] *and in direct conflict with that decision* as to the requirements of Oklahoma Constitution, Article V, Section 9(a),[5] deliberately violated the "Rules of Decision Act"[6] by seeking—in effect—to write a new Constitution for Oklahoma in this particular. In so doing, the 3-judge Court not merely exceeded its *jurisdiction*, but its *judicial power* as well.[7]

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[1] *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-178 (*id.*, No. 5, Oct. Term 1962, Opinion January 14, 1963); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-501; *Government & Civic Emp. Org. Com. CIO* v. *Windsor*, 353 U.S. 364, 366.

[2] Jurisdictional Statement, Appendix V, p. xliii.

[3] *id.*, p. 13.

[4] *Jones* v. *Freeman*, 193 Okla. 554, 564, 146 P.2d 564.

[5] Jurisdictional Statement, Appendix VII, p. lvi.

[6] Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. § 1652.

[7] *Gillis* v. *State of California*, 293 U.S. 62, 66; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25.

At the time that the appellants intervened in the litigation, the law of Oklahoma as declared in the *Jones* v. *Freeman* decision, *supra*, required that the membership of the State Senate presently should consist of more than 44 Senators, by reason of the "except" clause in Section 9(a), Article 5, of the Oklahoma Constitution, *supra*, if that law should be valid under the Constitution of the United States. At the time of intervention, therefore, the issues did not encompass any construction or declaration of the law of Oklahoma, by pleadings or otherwise; and no reason existed for objecting to the determination, by a Federal Court, of the purely Federal questions affecting the validity of that law or compliance or non-compliance therewith. It was not until the Decree of August 3 was entered, in effect overruling the declaration of the law of Oklahoma as announced by its highest Court and, by *construction* alone striking from Section 9(a) the "except" clause which the Oklahoma Court decision had determined to be a part of the section, and restricting the membership of the State Senate to 44 members, that the issue of the law of Oklahoma was introduced into the case. Then, for the first time, the considerations abovementioned became pertinent, injected into the litigation by the 3-judge Court itself, but simultaneously bringing into operation both the limitation upon its judicial power under the Rules of Decision Act and its corollary, the doctrine of abstention.

Cumulatively, it is not inappropriate to call to the notice of the Court[8] that, contemporaneously with the filing

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[8] *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331.

of this Response, appellants have caused to be docketed another appeal from a subsequent injunction issued by the 3-judge Court in this same litigation. The record on that appeal will disclose that 30 State Senators (including the majority of the State Senate who are appellants here) sought to resolve the confusion engendered by the decree here appealed, in its inexplicable citation and novel "interpretation" of the *Jones* v. *Freeman*[9] decision. They commenced an action in the State Supreme Court, by bill *quia timet*, for a declaration instructing them as to the extent of their powers under the State Constitution in the enactment of reapportionment legislation, *i.e.*, whether they were authorized, as State officials, to pass such legislation as the 3-judge Court had ordered, and if so, the extent of that authority not in violation of Federal Constitution or, if it should be necessary to submit constitutional amendments, should the present provisions be so irreconcilable with the Federal Constitution as to preclude compliance without contravention of the latter.[10]

This procedure was deemed to accord with the decisions of this Court in such situations.[11] *But, thereupon, the 3-judge Court enjoined the prosecution of that action in the*

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[9] See note 4, p. 2, this Response.

[10] Whether or not the Oklahoma Legislature has been culpably remiss in not sooner reapportioning itself is not necessarily involved in the litigation. Unquestionably, the inherent inequalities involved in an apportionment in strict accordance with the State Constitution, raised in the record in this cause, have operated at least as a contributing deterrent to revisionary action. At the present time, it cannot be validly challenged that the appellant Senators wish to provide a long-delayed reapportionment and propose to do so when the confusion created by the 3-judge Court Decree is removed.

[11] See note 1, p. 2, this Response.

State Court,[12] effectively entrenching its decree against any reconciliation with the law of Oklahoma.

The foregoing considerations, therefore, leave remaining the sole question of whether the appellees can avoid apparently inevitable reversal of the 3-judge Court Decree by inducing this Court to dismiss the appeal on purely procedural grounds.

ISSUES RELATING TO DISMISSAL

Time of Appeal

The time element, in the taking of this appeal may be resolved quite summarily. For all practical purposes, the Interlocutory Decree filed on June 19, 1962,[13] together with the "Further Statement of Facts and Law on the Merits"[14] became an integral part of the Decree filed on August 3, 1962,[15] in that a timely Motion to Alter or Amend Decree was filed in relation to the June 19 Decree on June 29, 1962, and *specifically ordered, by the Court, taken under advisement*, and thereafter "overruled" on August 3, 1962, in the Decree entered on that date.[16] Notice of appeal was filed on August 31, 1962—less than the time allowed by Rules 10 and 11.[17]

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[12] It is quite true that Federal questions also were alleged in the petition in the State court, it being deemed necessary under the decisions of this Court. *Government & Civic Emp. Org. Com. CIO* v. *Windsor*, *supra*, n. 1; *Harrison* v. *N.A.A.C.P.*, *supra* (Op. January 14, 1963).

[13] Jurisdictional Statement, Appendix III, p. xxvii.

[14] *id.*, Appendix IV, p. xxix.

[15] *id.*, Appendix V, p. xli.

[16] *id.*, p. 9.

[17] Act of June 24, 1949, c. 646, 62 Stat. 961, 28 U.S.C. § 2101(a).

An examination of the Motion to Alter or Amend will disclose that it unquestionably was of sufficient substance to warrant its consideration by the Court; and the partial effective sustaining thereof by the Decree of August 3, 1962 (even though the Court, by semantic transposition, declared the motion to be "overruled") attests to its substantiality. Hence, that earlier Decree—explained and clarified as a part of the August 3 Decree, and thereby actually partially sustained—did not become appealable until the latter date.[18]

Substance of Decree

It is conceded that the "Interlocutory Decree" of June 19, subsequently clarified, *in itself* might possibly be unappealable to this Court, in that it does not contain language of express injunctive import. In fact, the last paragraph[19] states that the cause is "continued for the effectuation of appropriate relief and final judgment." But that "Interlocutory Decree," when finalized, was incorporated in the Decree of August 3, *supra*,[20] and became an integral portion of the latter.

Appellees seek to make capital of the fact that a "protective" appeal also has been taken to the Court of Appeals for the Tenth Circuit. But such fact is not, by any means, a retraction from our contention that the Decrees of August 3 are truly injunctive in nature and effect. The other appeal was lodged in furtherance of a most natural prudence to forestall the possibility that this Court possibly might not

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[18] *United States* v. *Crescent Amusement Co.*, 323 U.S. 173.

[19] Jurisdiction Statement, Appendix III, p. xxviii.

[20] See note 15, p. 5, this Response.

agree with the considerations hereinafter urged and that the indefensible actions of the 3-judge Court might thereby become *res judicata*. For, even should their natural bias of advocacy have led counsel for appellants to an erroneous conclusion as to the effective character of the Decrees, they remain unquestionably as declaratory of Oklahoma law and the relation of the Federal Constitution thereto. It further might be added that the Circuit Court has been requested to certify to this Court the questions here appealed, in order that in all events these issues of transcendental public import[21] may be resolved in this Court in a manner consonant to its holdings in the other related causes before it at the present Term.

The fundamental factor in determining the appealability to this Court of the Decree of the 3-judge Court is conceded by appellants to be the presence or absence of injunctive effect in their operation; but it is not conceded that any semantic label appended to them is conclusive of their ultimate nature.

It is axiomatic that a decree or judgment is to be classified by reference to its substance rather than either its form or its appellation.[22] And an examination of the Decrees, considered in the light of pertinent collateral considerations can leave no rational doubt as to their intended operative effect.

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[21] See *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U.S. 498, and cases cited.

[22] *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541, 546-547; *Feinberg* v. *Doe*, 14 Cal.2d 24, 92 P.2d 640, 642.

The language[23] "The Oklahoma Legislature *will be* reapportioned," "The House of Representatives of the Oklahoma Legislature *will be* reapportioned," "The Senate of the Oklahoma Legislature *will be* reapportioned" (in each case specifying the particular manner of so doing), and when the Legislature convenes, "*it must reapportion itself,*" are not mere pronouncements of exhortation. They are cast in the grammatical imperative mood.

It is to no avail that appellees urge that the appellant State Senators voluntarily intervened in the litigation. The ultimate fact remains that they *were* parties when the Decree of August 3 was rendered; and a further ultimate fact is that they, being the *only defendants* in the litigation capable of implementing the decretal command of the 3-judge Court, are directly subjected to its unequivocal mandate to act.

That the 3-judge Court stated, in connection with its order, one method by which it contemplated its enforcement if not obeyed did not dilute its authoritative purport. Equity does not enter a decree that binds no one and determines nothing.[24] And a court of equity is not limited to contempt proceedings to enforce its decrees.[25]

Cumulatively, the subsequent actions of the 3-judge Court furnish an even clearer index to its intentions in the August 3 Decree. Had it been intended merely to issue an

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[23] Jurisdictional Statement, Appendix V, pp. xli-xliv.

[24] *Electric Steel Foundry* v. *Huntley* (C.C. 9th), 32 F.2d 892.

[25] *Copeland* v. *Bennett*, Tex. Civ. App., 243 S.W.2d 264; *Baker* v. *Carr*, 369 U.S. 186.

interlocutory pronouncement of abstract law, unaccompanied by the symbols of inviolable command, it is logically inconceivable that it would have enjoined a resort to the Supreme Court of Oklahoma for construction of the law of the State, as indicated in the record of the appeal being docketed as abovementioned. The only possible conclusion consonant with rationality—and in vindication of an otherwise wholly indefensible abuse of discretion—is the interpretation offered by counsel for appellees in seeking that later injunction, i.e., that appellants were seeking to collaterally attack the positive judgment rendered by the 3-judge Court on August 3, thereby seeking to interfere with the enforcement by the latter of its mandatory decree.

Whether or not that constitutes sufficient cause for issuance of that subsequent injunction necessarily must await determination of the appeal from that order. But the fact of its issuance cannot fail to furnish probative evidence of the intention of the judges who promulgated the Decrees involved in this appeal.

Respectfully submitted,

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[illegible] ARY
SUPREME COURT, U. S.

[illegible]
FILED
[illegible]

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. [illegible]

[illegible]

Appellants,

vs.

[illegible]

Appellees.

[illegible]

[illegible]

Points Relied On
by Appellants, Consolidated Canal
Land Company,
Rose Consolidated,
Attorneys for Petitioners Rose Bowers
and Louis H. Rose, Appellants.

[illegible]

SUBJECT INDEX

	PAGE
Statement of Case	1
Responsive Argument	2
Conclusion	8

AUTHORITIES CITED

CONSTITUTIONAL PROVISIONS:

United States Constitution, 14th Amendment	8
Oklahoma Constitution, Art. V, Sec. 2	8
Oklahoma Constitution, Art. V, Sec. 6	6-7

STATUTES:

28 U.S.C., Sec. 1253	2, 3
28 U.S.C., Sec. 2281	3

MISCELLANEOUS:

43 C.J.S., Sec. 1	3

CASES:

Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691	5

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 689

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE TO MOTION TO DISMISS

STATEMENT OF CASE

The facts pertinent to this appeal are set forth in the Jurisdictional Statement heretofore filed by appellants.

RESPONSIVE ARGUMENT

Appellees contend:

I.

That no order has been issued in this cause which is appealable, and that no injunctive relief has been granted.

In this connection, we would call attention of the Court to the following incidents which have occurred and orders which have been issued in this case, which would render the action of the lower court subject to appeal under Title 28, Sec. 1253, on the ground that the order of the lower court of August 3, 1962, is *either* an interlocutory or permanent injunction.

The interlocutory decree of June 9 provided that "this cause be continued until July 31, 1962, for the effectuation of appropriate relief and *final judgment.*"

The order entered on July 31, 1962, and filed August 3, 1962, is titled "*Decree.*" In the paragraph just preceding the concluding clause of that order, the lower court states:

> "Five months hence, when the Legislature convenes, it *must* reapportion itself in accordance with the Constitutional mandate or be judicially reapportioned."

This can certainly be construed as nothing less than an alternative writ, or a mandatory injunction.

In the body of the Decree, the court also made the following comment which fortifies our contention:

> "The Oklahoma Legislature *will be* reapportioned—on the general principle of *substantial numerical equality* in the *two Houses.*"

Corpus Juris [43 C.J.S., §1] defines an injunction as:

> "An injunction is a writ framed according to the circumstances of the case commanding an act which the Court regards as essential to justice; * * *"

Apparently, the lower court felt that the circumstances of this case justified such command as being essential to justice; and so decreed.

Among other guidelines or standards which the court *established* (see Appendix V, Jurisdictional Statement) were:

> "* * * the Court *finds* and *declares* that the seven member ceiling established in Section 10(d), Article V, Oklahoma Constitution for populous counties * * * *must be disregarded.*"

Further, (paragraph 4 of the Decree, Appendix V):

> "* * * the Oklahoma Senate *will* thus *consist* of *44 districts and 44 senators.* Under the 1960 Federal census, Oklahoma County is entitled to eight senatorial districts and senators; Tulsa County is seven senatorial districts and senators, and Comanche County, two senatorial districts and senators."

This last standard which was [illegible]oined upon the Legislature, ignores the provision of the Oklahoma Constitution which authorizes a Senate in excess of 44 Senators.

This Decree was obviously a mandatory injunction under which the Legislature was enjoined to reapportion. It is therefore an appealable order under Title 28, U.S.C., Sec. 2281 and Title 28, U.S.C., Sec. 1253.

II.

Appellees further contend:

"That appellants in effect admit the existence of invidious discrimination in Oklahoma."

These appellants on the contrary do not admit such to be the case; but on the other hand, take the position that if such discrimination does exist, the power to rectify any such condition lies with the Legislature, and if it fails to function, then the plaintiff, Mr. Moss, and the "congested areas" which he represents, have full power under the Initiative and Referendum, for adequate redress.

III.

Appellees also contend:

"An appeal at this time would cause piecemeal appeals. It will be time enough to review the action of the court when a remedy has been afforded."

It occurs to us that this is not a premature appeal; and that if appellant had waited until the March 8th reapportionment by the court in accordance with the standards and guidelines so clearly drawn by the lower court in its Decree of July 31, filed August 3, 1962, that we would have been immediately confronted with the contention that the formula was set forth and enjoined upon the Legislature on that date, and that an appeal from an implementing and simply ministerial order of March 8 would be wholly out of time. The Order of July 31 insofar as it established and enjoined upon the Legislature the only guidelines and standards which the lower court would

approve or condone, were plain, comprehensive, and final. Any subsequent order would constitute merely an application of those standards.

The Decree of July 31 may well be appropriately compared to the plans and orders relating to a military engagement. Both the strategic and the tactical battle plans have already been prepared. They have been issued to commanders who are directed to carry them out to the letter. The only order remaining to be issued from headquarters is the date and time for launching the attack. That order will not change the strategic or tactical plans one iota. Those are the basic plans, and the final order to launch the engagement is purely perfunctory. The strategic and tactical decree of July 31 is the meat of the entire case, and it would be so argued, the Court may rest assured, in the event these appellants had delayed their appeal until after March 8th.

IV.

The appellees finally contend:

> "The initiative does not afford adequate relief in Oklahoma for redress of the deprivation of the Constitutional rights of the plaintiff."

In the first place, as pointed out in the Jurisdictional Statement, in the case of *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, it was stated by JUSTICE CLARK that one of the reasons for acceptance of jurisdiction in that case, was:

> "Tennessee has no Initiative and Referendum."

One of the principal points upon which Oklahoma Farm Bureau bases its contention, and which motivates

this appeal, is that: Not only does the court ignore that Oklahoma is endowed with a republican form of government, which was acknowledged by Congress and the President at the time of Oklahoma's entry into the Union; not only does it strike down portions of the Oklahoma Constitution; and not only does it decree and direct the Legislature to apportion *both Houses* on the basis of population, but it pointedly ignores the remedy available to the plaintiff, and those similarly situated—The Initiative and the Referendum.

Appellees assert that the Initiative will not afford relief.

They refer to the recent majority of 62,000 on the Initiative referred to in Appendix 12 of Appellants' Jurisdictional Statement. We agree that the petition was struck down by virtue of the fact that it was placed on the ballot at a general election instead of a special election, where it was technically killed by the silent vote.

The purpose of that petition, however, was simply to substitute a reapportionment commission for the Legislature, for the purpose of reapportioning on the present constitutional formula. We do not agree with appellees' statement that under Article V, Section 6, of the Oklahoma Constitution, that it would require 25 per cent of the legal voters to submit another petition setting up a commission, and changing the constitutional formula.

Article V, Section 6, Oklahoma Constitution, simply provides:

> "Any *measure* rejected by the people through the powers of the initiative and referendum cannot be

again proposed by the initiative within three years thereafter by less than 25% of the legal voters."

This does not say any "similar" measure, so in order to require a number of signatures measured by 25 per cent of the legal voters, the petition would have to be substantially the same as the one appearing in Appendix 12.

Furthermore, it is a matter of common knowledge that the Oklahoma Legislature now in session has prepared a joint resolution under which it is proposed to submit to the people by referendum, an amendment to the Constitution which would at least apportion one of the Houses on the basis of voting population. This, of course, would require no petition.

Such action, however, they are restrained and enjoined from taking because the court has expressly enjoined upon the Legislature the sole responsibility of *passing legislation* apportioning *both Houses* on the *basis of population*, with no provision and no opportunity to submit such legislation by way of Constitutional referendum to the people.

It is further a matter of common knowledge that the current Legislature has now also passed legislation which will provide for 47 Senators; but which follows the Constitutional formula as to the House of Representatives, limiting Oklahoma and Tulsa Counties to seven House members each. This formula, of course, does not comply with the standards and guidelines laid down by the lower court in its Decree of July 31. Appellants therefore will undoubtedly seek to have the lower court strike down such legislation, as not being in compliance with the Decree of July 31;

and in doing so, will insist that they have no adequate remedy at law.

They have and will have deliberately ignored the remedy provided by the Oklahoma Constitution—the Initiative and Referendum. Under the provisions of Article V, Section 2, of the Oklahoma Constitution, they will only be required to have their referendum petition signed by 5 per cent of the legal voters who cast votes at the last general election, to refer such legislation to the people for final decision. It is factually evident from the assertions in plaintiff's own complaint filed in this case, that they represent ten times the voting strength of the Oklahoma rural population. It is therefore readily apparent that they are capable not only of successfully circulating a referendum petition, but carrying the election overwhelmingly, if they are dissatisfied with this, or any other, apportionment legislation which may be adopted at the current session; and at the same time and at the same election, may, under the Initiative adopt the formula they do approve.

To contend, therefore, that they have no adequate remedy at law, or that the remedy of the Initiative and Referendum is ineffective, is to be completely unrealistic and inaccurate.

CONCLUSION

It is sincerely urged, therefore, that the Court accept jurisdiction of this case so that the questions as presented in appellants' Jurisdictional Statement, and which will be more fully developed in our brief, may be given plenary treatment in order that our legislators and political leaders may know:

(1) Whether the 14th Amendment requires *both* Houses to be apportioned on the basis of *population;* and

(2) Whether or not the citizens of a state who have available to them the remedy of Initiative and Referendum are entitled to seek Federal intervention, to perform that which they can do for themselves.

Respectfully submitted,

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